



MINISTÈRE  
DE LA CULTURE

*Liberté  
Égalité  
Fraternité*

# Task force report on remuneration for cultural content used by AI systems – Legal component



**PRESENTED TO THE CONSEIL SUPÉRIEUR DE LA  
PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE [SUPERIOR  
COUNCIL OF LITERARY AND ARTISTIC PROPERTY]**

Task force co-chair : Alexandra Bensamoun  
Co-rapporteur : Julie Groffe-Charrier

**Task force co-chair**  
**Alexandra Bensamoun**  
Professor (Law)  
Expert member of the  
CSPLA

**Co-rapporteur**  
Julie Groffe-Charrier  
Associate Professor HDR  
(Law)

Report presented to the  
plenary meeting of the  
CSPLA, June 23, 2025

*Its content is the sole responsibility of its authors*

*A document focusing on the economic aspects of this issue has  
been developed by Professor Joëlle Farchy, task force co-chair and  
honorary member of the CSPLA, with Bastien Blain, associate  
professor, co-rapporteur.*

© Cover image:  
Lascaux cave: the hall of bulls  
Ministry of Culture -  
Heritage Media Library,  
Dist. RMN-Grand Palais /  
Image IGN

## **Executive summary 5**

<b>Introduction .....</b>	<b>9</b>
<b>1. Context .....</b>	<b>9</b>
1.1. The subject of remuneration for cultural content used by AIS is far from incidental.	9
1.2. The development of generative AI produces unprecedented upheaval in the cultural sector .....	11
1.3. The current legal framework is unsatisfactory, provoking evident legal uncertainty .....	15
<b>2. The meeting of needs .....</b>	<b>22</b>
2.1. Demand .....	22
2.2. Supply .....	23
2.3. Making supply and demand meet .....	24
<b>3. Time for reflection.....</b>	<b>25</b>
<b>PART 1. THE NEED FOR A MARKET .....</b>	<b>31</b>
<b>1. The indispensable preservation of the right to an effective remedy.....</b>	<b>31</b>
<b>2. Alternative solutions to transparency .....</b>	<b>34</b>
2.1. In the pre-litigation phase .....	35
2.1.1. The preliminary necessity of dialogue .....	35
2.1.2. The possibility of establishing an AI mediator .....	36
2.1.3. Pre-litigation procedural tools.....	39
2.2. In the litigation phase.....	41
2.2.1. The presumption of use path.....	42
2.2.2. Other procedural avenues .....	50
2.2.3. The site of the formalisation of mechanisms .....	54
<b>PART 2. THE POSSIBILITY OF A MARKET .....</b>	<b>56</b>
<b>1. The field of possibilities .....</b>	<b>56</b>
1.1. Existing models.....	56
1.2. Excluded models .....	58
<b>2. The task force's preference .....</b>	<b>62</b>
2.1. The chosen model .....	62
2.2. Remuneration criteria.....	66
2.3. Examples of remuneration models.....	68
2.4. Valuation .....	70
2.4.1. Data value .....	70
2.4.2. Use value.....	72
2.5. The price of the past.....	75
<b>PART 3. MARKET IMPLEMENTATION.....</b>	<b>78</b>
<b>1. Current competitive risks.....</b>	<b>78</b>

1.1. Rejecting implementation of the theory of essential facilities.....	78
1.2. Possible characterisation of abuse of a dominant position .....	80
1.3. The unlikely risk of a cartel .....	82
<b>2. Simplification tools.....</b>	<b>82</b>
2.1. Simplification of obtaining authorisations.....	83
2.2. Simplification of content access .....	84
<b>3. Possible support from an authority in negotiations? .....</b>	<b>89</b>
<b>PART 4. SUMMARY OF PROPOSALS.....</b>	<b>90</b>
<b>1. Recommendations for developing the legal framework .....</b>	<b>90</b>
1.1. Soft law .....	90
1.2. Hard law .....	90
1.2.1. Procedural law .....	91
1.2.2. Substantive law .....	94
<b>2. Implementation tools .....</b>	<b>95</b>
Appendices.....	96
<i>Summary of responses to the questionnaire distributed in May 2024 .....</i>	<i>96</i>
<i>List of legal task force interlocutors—individuals interviewed, contributors, or respondents to the questionnaire.....</i>	<i>97</i>
<i>Mission letter .....</i>	<i>100</i>

## FOREWORD

*This document presents the reflections of the legal component of the task force relating to the remuneration of cultural content used by artificial intelligence (AI) systems as of May 2025. It follows the interim note presented in December 2024<sup>1</sup>.*

*The reflections here are necessarily anchored in a particular time, and the positions presented should not be considered definitive. The report will undoubtedly need to be reevaluated at some point, taking into account the evolution of practices and knowledge.*

*The task force also includes an economic component developed by Professor Joëlle Farchy, assisted by Bastien Blain<sup>2</sup>.*

---

<sup>1</sup> Legal interim note, task force concerning *the remuneration of cultural content used by artificial intelligence*, CSPLA, Dec. 2024.

<sup>2</sup> An economic interim note has likewise been produced.

## Executive summary

The development of artificial intelligence (AI) is both an opportunity and a risk. While our societies can undoubtedly benefit from the advances that AI systems (AIS) bring in terms of health, security, research, etc., the technology can also infringe upon numerous rights.

In this regard, the protection of cultural content appears to be a priority, generating interest from authorities and legislators. AI models are fuelled by a range of content, some of which may be protected by copyright or related rights. Generative AI solutions thereafter enable the production of content that may directly compete with human content. This observation is by no means economically neutral, and already has notable consequences in terms of employment in certain creative sectors. Consequently, AIS represent a dual risk: the infringement of literary and artistic property rights and the replacement of human creation.

To mitigate the risk of dispossession (both of the exercise of rights and of the human role in creation), this task force has been invited to focus on the compensation arrangements for cultural content used by AI. While the reflection here is primarily legal<sup>3</sup>, it necessarily raises broader issues such as the preservation of cultural integrity and even sovereignty.

The time has come to support a **fair, transparent and sustainable framework for the use of cultural content in the AI era**. This task force holds the conviction that **a secure and lasting market can—and even must—emerge from negotiations between AI providers and rightholders**. However, such a dialogue currently faces obstacles, among which are the scope of exceptions (text and data mining in the European Union, as well as fair use in the United States) and the absence of genuine guarantees concerning the right to an effective remedy for rightholders, many of whom face great difficulties in demonstrating the actual use of their content by AI due to currently insufficient transparency regarding the use of such content by AI.

The purpose of these reflections is therefore to find ways to **restore effectiveness to the law**, as called for in the task force mission letter. There can be no framework conducive to the emergence of an ethical and competitive market if one of the actors—in this case, the rightholder—is deprived of exercising their right over the very object of the market.

In the absence of satisfactory transparency, this task force proposes a series of measures that could overcome such obstacles and restore rights. The central idea is to provide a sort of “toolkit” of **legally incentivising measures**, in order to

---

<sup>3</sup> A parallel economic analysis is being conducted by Professor Joëlle Farchy, co-president of the task force, alongside a co-rapporteur, Bastien Blain.

facilitate the creation of this market. The guiding principle here is the licensing of the use of protected content to the benefit of both rightholders and AI developers, who require legal certainty. Indeed, a clarification of the legal situation would be positive for all parties, who could then construct the market together with equanimity.

In a pre-litigation or non-contentious phase, in order to build trust, **dialogue between parties should be supported politically**, which would result in the production of a **charter** establishing a (non-binding) framework for desired negotiations. At the very least, this conciliatory phase could well rekindle the habit of negotiation between some of the actors concerned. Furthermore, an **AI mediator**, a sort of **trusted third party**, could be established to facilitate dialogue and the transmission of information, while also preserving the confidentiality demanded by AI providers.

At the litigation stage (knowing that the **prophylactic effect of the rule** must be taken into account), and with the objective of restoring the effectiveness of certain rights—literary and artistic property rights; right to an effective remedy—the approach of a **rebuttable presumption of use of cultural content by AIS** is proposed, provided that there exist **serious indications** that attest to the plausible nature of this use in the AIS data supply chain. Such a presumption would have the advantage of restoring the effectiveness of literary and artistic property rights, thereby encouraging the actors concerned to engage in discussion, while also preserving the possibility for the AI provider to adduce contradictory evidence. Such a mechanism for facilitating the provision of proof is present in copyright law, where it is sometimes even determined by judicial interpretation, as authorised by Article 1382 of the French Civil Code. A **class action** could also be envisaged in this perspective, without individual suits (some of which are by nature “collective”) being prohibited. Moreover, an **evidence disclosure injunction mechanism, inspired by European and United States law**, could usefully complement such proposals.

These measures, in addition to restoring property rights as well as the right to an effective remedy, are all levers that would respond to the necessity of a market (Part 1).

The restoration of long-standing rights will foster the establishment of an egalitarian relationship that will, in turn, make the emergence of the market possible (Part 2). This last could be built on several different remuneration models, ranging from individual management to compensated exception, and could include voluntary collective management, extended collective licensing, mandatory collective management and legal licensing. It became clear to this task force that, considering the state of positive law and given that the market is not yet mature, consent must be preserved. Thus, any solution ought to be based on **individual management, supplemented by voluntary collective management** in cases where rightholders consider that they cannot or do not wish to directly manage their rights.

The choice made by this task force is explained by the fact that it used **the safeguarding of consent and therefore of the exclusive right monopoly** as its guiding principle. Given the context in which feelings of dispossession are extremely strong among rightholders, this appears essential. Furthermore, current circumstances do not correspond to exceptional situations—always expressly enshrined by the European legislator—in which the power to authorise or prohibit can be foregone in favour of a simple right to remuneration.

The market will thus be built through **negotiation**, with the level of remuneration due varying according to several criteria (economic size of the actor; types of use envisaged, etc.). Seeing as **price adjustment** has been practised in the past by rightholders—*a fortiori* in the context of non-exclusive licences—the implementation of this solution is not in itself a source of difficulties.

In this regard, the task force also considers that, while the principle must remain that of **proportional remuneration**, in certain circumstances **flat-rate remuneration** may be useful for rightholders, at least initially. Here again, contractual freedom must take precedence; general practices will be established with greater confidence once the economic model is better understood by both sides. Such an approach, moreover, does not require legislative modification, seeing as the current situation corresponds to some of the exceptions already envisaged by the legislator, which allows the implementation of such a derogation-based solution.

The recommendation of a **licensing market**, while essential to creating a market for the future, does not, however, resolve issues from the past. Previous situations must not simply be glossed over, as their settlement is also a step towards establishing a framework of trust.

By the same token, the **risk of human creations being gradually replaced by AI-generated content** must not be neglected. The preservation of **cultural diversity** should encourage public policies to safeguard the human dimension of creation. In any event, the need for a secure market to emerge is only reinforced by the identification of such risks.

Once the business model is established, difficulties may finally arise during market implementation (Part 3).

First, **competitive risks** must be identified, particularly in the area of abuse of a dominant position. The establishment of a market that respects the value chain helps limit this pitfall.

Above all, the development of **simplification tools** appears necessary. On one hand, it can be arduous—even impossible—for rightholders to provide authorisations for immense masses of data, or to make large-scale databases available. On the other hand, within the framework of their economic strategy, AI actors require facilitated access to massive amounts of quality data.

Therefore, and without ever ruling out the possibility for rightholders to give these authorisations or access **directly—alone, grouped together, or through a collective management organisation acting under mandate**—the task force notes the value of **technical data providers**, “simplified service desks” that could negotiate licensing agreements in the name of and on behalf of rightholders, while also providing catalogues of useful data. The task force further recommends supporting the creation of **quality datasets**, organised and annotated and under the control of rightholders.

Since data quality increases AI performance, holders who formulate an **attractive supply** undoubtedly have here the means not only to encourage the signing of licensing contracts, but also to attain stronger **market power** by reducing existing asymmetries.



These operational simplifications ought to facilitate the **implementation** of the chosen market model—a licensing market—and not substitute for it by confiscating the consent of rightholders in the process.

\*\*\*\*\*

*The task force emphasises that the emergence of a market, in which the conditions and considerations for the use of cultural content by AI would be negotiated, is the absolute precondition for preserving literary and artistic property rights without hampering the development of the AI ecosystem.*

*A measured and balanced approach is therefore essential. While the terms of use and remuneration cannot be imposed on rightholders, who must retain the full exercise of their property rights—a fundamental right—the operational needs of AI actors must also be taken into account.*

*It is this middle path that will make it possible to establish the required framework of trust, offering the necessary legal certainty for the development of a competitive AI ecosystem while resolving radical oppositions.*

# **Introduction**

## **1. Context**

**The issues.** The remuneration of cultural content used by artificial intelligence systems (AIS) is undoubtedly a question of equity and of justice. It is also a novel question of value sharing. This subject is by no means secondary, implicating, as it does, the matter of sovereignty (1.1.). Given that the development of generative artificial intelligence (AI) solutions brings about an unprecedented upheaval in cultural sectors (1.2.), it must be treated all the more seriously. However, the legal framework currently in place appears unsatisfactory, creating evident legal uncertainty (1.3.).

1.1. The subject of remuneration for cultural content used by AIS is far from incidental

**A question of sovereignty/sovereignities.** AI indisputably engages an economic debate. Its promises are such that policymakers are rallying to support an innovation that suggests gains not only in terms of productivity and growth, but also in terms of scientific and medical progress. At the same time, AI presents a sovereignty issue, one that arises with all the more urgency in the current geopolitical context. Between the United States which, convinced that the market is all that matters, chooses deregulation, and China which, mixing technology and politics, chooses excessive regulation, the European Union must forge its own path, doubtless a more autonomous, middle way.

For this reason, AI is also obviously a question of sovereignty. A question of political, technological, economic but also cultural sovereignty, at both the French and European levels. The AI Action Summit, organised in Paris in February 2025, is a clear illustration of this.

France may lack digital giants among its active forces, but it has other recognised assets<sup>4</sup>. Its talent, for one: many globally renowned AI researchers are of French origin. But culture is also part of France's indisputable wealth, both through its general attractiveness and through the soft power it exercises throughout the world. More broadly, the European Union must also assert its cultural sovereignty, as a shared identity.

Sacrificing culture on the altar of technology would make no sense when, taken together, the various segments of its cultural field—audiovisual, live performance, books, the press, advertising, architecture, visual arts, cultural heritage, and artistic and cultural education—realize in France a total production of 100.1 billion euros, and generate added value of 47.1 billion euros.

---

<sup>4</sup> Interministerial Commission on AI, *AI: Our Ambition for France*, report submitted to the President of the Republic, March 2024.

In 2022, the direct economic impact of culture was established at 47.1 billion euros, or 2.0% of the entire French economy<sup>5</sup>.

**The AI cultural revolution.** The cultural sector, however, is being challenged by the “AI wave.” The effectiveness of protection is being called into question. Even its historical legitimacy is disputed. Copyright is no longer that superb catch-all protector of the arts, recognised during the French Revolution as a natural right, as “*the most sacred, the most incontestable and [...] the most personal of all properties*”<sup>6</sup>. It is accused of being a brake on innovation; its proprietary model is denounced as outdated. Creation no longer seems to be the prerogative of human beings. Worse, the singularity of human creation is no longer praised in and of itself, but instead for its utility.

No battle truly exists between the ancients and the moderns: culture has always adapted to technology, from the invention of printing to the spread of the internet, profoundly modifying cultural practices in the process. Culture will have to confront AI, and also refashion it for its own uses.

**Taking culture seriously.** In this framework, the opposition between innovation and regulation is unproductive. No market can be built, in a secure and lasting way, by ignoring any part of the value chain. To this effect, the President of the Republic concluded the AI Action Summit in February 2025, by affirming the necessity of moving beyond the opposition between opportunities and risks, to build a “*trustworthy AI*,” a European framework that, notably, “*respects creativity, copyright, related rights, which allows all rightholders to make a living from their art*”<sup>7</sup>. In the same vein, the Minister of Culture, Rachida Dati, recalled the necessity of guaranteeing “*not a bargain-basement compromise, but a genuine virtuous circle between innovation and respect for creators*”<sup>8</sup>. After the episode of the release of ChatGPT’s GPT-4o, allowing the generation of images in the manner of Studio Ghibli without any authorisation being granted by rightholders, the Minister of AI, Clara Chappaz, similarly stated that “*AI enriches art if it respects creation*”<sup>9</sup>. The press release published following the Council of Culture Ministers of the European Union on May 13, 2025 follows this line of thinking<sup>10</sup>. It identifies four decisive points for preserving fundamental rights, “particularly copyright and related rights”: the strategic impact on the sustainability of European cultural and creative industries; the possibility of joint and coordinated intervention;

---

<sup>5</sup> DEPS, Key figures 2024 for culture and communication, Apr. 30, 2025, accessible online.

<sup>6</sup> The Le Chapelier Report, on the petition brought by playwrights, during the session of January 13, 1791.

<sup>7</sup> E. Macron, concluding speech (oral remarks), Summit for AI Action, February 11, 2025, Grand Palais, Paris.

<sup>8</sup> R. Dati, introductory speech (oral remarks), Cultural weekend, Summit for AI Action, February 8, 2025, BNF, Paris.

<sup>9</sup> <https://www.latribune.fr/idees/tribunes/clara-chappaz-l-ia-enrichit-l-art-si-elle-respecte-la-creation-1021897.html>

<sup>10</sup> Press release, “The value of culture and creative sectors in the development of AI: preserving copyright and related rights and ensuring transparency within the framework of the AI law,” available at the following link: <https://www.culture.gouv.fr/fr/presse/communiqués-de-presse/la-valeur-des-secteurs-de-la-culture-et-de-la-creation-dans-le-developpement-de-l-ia-preserver-les-droits-d-auteur-et-les-droits-voisins-et-gara>

the urgency of guaranteeing legal certainty and transparency when using protected data; and consistency with fundamental values as well as with the existing European legal framework.

There can be no doubt that the AI ecosystem must be supported. But this support cannot reasonably come at the sacrifice of certain rights. Regulation carries our values, our political, moral, and economic choices. Taking culture seriously to build a balanced, virtuous framework, thus avoiding divisions: this is a necessity in the face of the upheaval brought about by generative AI.

## 1.2. The development of generative AI produces unprecedented upheaval in the cultural sector

**Infringement of intellectual property as a risk.** Generative AI constitutes a challenge for the cultural sector. Not only is protected content used upstream to train models, without authorisation or remuneration; downstream, AI output will likely, in time, substitute for this same protected content.

The risk is twofold: upstream infringement gives rise to downstream parasitism that could well dilute or even erase human creation, and ultimately substitute for it.

Several studies have identified the infringement of intellectual property rights as a risk<sup>11</sup>. The United Nations AI Advisory Board highlights the danger in economic terms<sup>12</sup>, qualifying the situation as representing a significant level of concern<sup>13</sup>. Naturally, this is not the only existing risk regarding the deployment of generative AI. Other types of perils are connected—even if only indirectly—to the question of remuneration for cultural content used by AI models. Consider, for example, infringements on personal data or even personality rights, particularly when it comes to reproducing the facial features of a performer or the voice of an artist<sup>14</sup>. Indeed, actors and voice recording artists are particularly vulnerable to AI in this regard<sup>15</sup>.

---

<sup>11</sup> See notably P. Slattery, A. K. Saeri, E. A. C. Grundy, J. Graham, M. Noetel, R. Uuk, J. Dao, S. Pour, S. Casper and N. Thompson, “The AI Risk Repository: A Comprehensive Meta-Review, Database, and Taxonomy of Risks From Artificial Intelligence,” *MIT*, August 13, 2024, p. 1 et seq.

<sup>12</sup> United Nations, AI Advisory Board, “Governing AI for Humanity,” Sept. 2024, p. 31.

<sup>13</sup> Ibid., p. 29: 27% of experts surveyed consider themselves concerned and 27% very concerned about the infringement of intellectual property rights caused by AI development.

<sup>14</sup> On this question, see notably U.S. Copyright Office, *Copyright and artificial intelligence. Part 1: Digital replicas*, July 2024, accessible via the following link: <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf>. A “digital replica” is defined as “a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual”. On this subject, see the bill introduced in the House of Representatives in December 2024, which provides for the possibility of sanctioning the use of voice, image, etc. The text, called the “PADRA bill” (Preventing Abuse of Digital Replicas Act) is accessible via the following link: <https://issa.house.gov/media/press-releases/congressman-issa-introduces-landmark-legislation-stop-misuse-ai-generated>

<sup>15</sup> See the petition “Touche pas à ma VF” [Hands Off My French Dubbing], which gathered almost 200,000 signatures in April 2025: <https://www.change.org/p/pour-un-doublage-cr%C3%A9%C3%A9-par-des-humains-pour-des-humains-touche-pas-ma-vf-beab56eb-a759-4117-b77c-7d03bcaa35f8> - See also the organisation Les Voix [The Voices]: <https://lesvoix.fr/>

**The rallying of rightholders.** Invoking a quasi-existential risk, even a “theft” of their content<sup>16</sup>, literary and artistic property rightholders are rallying together and attempting to make their voices heard.

For example, a declaration on AI training has been published online, bringing together as of May 2025 the signatures of more than 50,000 creators, companies, and representatives of the creative sector<sup>17</sup>. The declaration, which can be summarised in following phrase, states that *“the unlicensed use of creative works for generative AI training is a major and unfair threat to the livelihoods of the people behind these works and must not be permitted”*. The text has been endorsed in the United States by SAG-AFTRA, as well as by the International Affiliation of Writers Guilds, the International Federation of the Phonographic Industry, and by SACEM in France. The keen concern expressed in this short text may not be novel, but its international nature is the sign of a common concern among our societies for the future of human creation.

In a similar vein, one can also note the letter by a broad coalition of creative actors on October 29, 2024 addressed to members of the European Parliament, executive vice-presidents, designated commissioners and representatives of Member States. This missive invited the European legislator to support cultural industries by ensuring that the AI Act (AIA)<sup>18</sup> would allow for the protection of copyright and related rights against generative AI, with the objective being to achieve “a healthy and sustainable licensing market that encourages responsible AI innovation and complies with core principles of fair market competition and remuneration for creators and rightholders, while effectively preventing unauthorised uses of their works.”<sup>19</sup> In a similar way, the open letter “Protect Europe’s creative soul,” from April 2025, draws attention to the fact that “[the rights of authors and rightholders] are being systematically eroded under the guise of ‘promoting innovation’”<sup>20</sup>. Meanwhile, the “#staytruetotheact”<sup>21</sup> movement—which brings together actors from both culture and science—

---

<sup>16</sup> In this regard, see notably the movement of major American publishers, who call on the government to identify and fight against the “theft” committed by AIS. On this point, see notably E. Roth, “Major publishers call on the U.S. government to ‘Stop AI Theft’,” *The Verge*, Apr. 7, 2025, accessible via the following link: <https://www.theverge.com/news/644612/major-publishers-stop-ai-theft-ad-campaign>

<sup>17</sup> The text of the declaration (Oct. 2024) is accessible via the following link: <https://www.aitrainingstatement.org/>

<sup>18</sup> Regulation 2024/1689 of June 13, 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

<sup>19</sup> Ibid.

<sup>20</sup> Open letter to Ms. Virkkunen, “Protect Europe’s Creative Soul,” Apr. 25, 2025, accessible [here](#).

<sup>21</sup> On this initiative, see the dedicated website: <https://staytruetotheact.eu/>.

similarly calls on the European Union to respect the spirit of the AIA and to defend the fundamental rights of authors and holders of related rights.

It should also be noted that a charter called “Culture and Innovation” had been proposed by rightholders within the framework of the AI Action Summit of February 2025. Bringing together the signatures of the global creative community—40 international organisations—it included five principles: respect for fundamental rights by AI models, including copyright and related rights, notably through diligent research and respect for the express will of rightholders; effective and complete transparency vis-à-vis rightholders on protected works and content used to ensure AI model training; encouraging AI models to sign licences within the framework of duly negotiated authorisations with rightholders; fair and appropriate remuneration for the use of works and content protected by intellectual property; and effective sanctions in case of non-compliance with these principles<sup>22</sup>.

Last but not least, rightholders rallied together to contest the proposed third version of the Code of Practice<sup>23</sup>, and even indicated their preference for a pure and simple withdrawal of the contentious matter from it. The Code notably ought to clarify the obligation to respect the Community *acquis* regarding copyright and related rights, provided for in Article 53 1 (c), of the AIA. Rightholders also point to the transparency requirement regarding sources used by AI enshrined in Article 53 1 (d), claiming in this regard that meaningful transparency is both (i) legally necessary to allow the exercise and respect of rights, as well as (ii) technically feasible.

At this stage, the template for transparency produced by the AI Office is not yet published. In the draft Code, the balance seems to lean towards AI actors—despite the fact that they threaten not to adhere to it. France is attempting to assert a position of balance between the interests of AI providers and those of rightholders<sup>24</sup>. Spain has also made its concerns known to the European Commission. In a letter dated April 30, 2025 and sent to Digital and Culture Commissioners Henna Virkkunen and Glenn Micallef, the Spanish Minister of Culture, Ernest Urtasun, requested a revision of the third draft of the Code of Practice, asking, in the interest of the Union, for better consideration of the demands of the European cultural and creative sector<sup>25</sup>. The Spanish, Italian and Portuguese Ministries of Culture have moreover stated (in a preparatory document<sup>26</sup> for the “Education, Youth, Culture and Sport” Council in Brussels, on May 13, 2025) their desire to address the subject, supporting total transparency on data used by AI models and calling for “coordinated” action by Member States to control the application of the Code of Practice. The three States request “an adequate and rapid response” from Europe to

---

<sup>22</sup> <https://respectdudroitdauteur.fr>

<sup>23</sup> See the Joint Declaration of a coalition of authors, performers and rightholders from the cultural and creative sectors of the EU, concerning the third draft of the Code of Practice provided for by the AI Act for general-purpose AI models, accessible via the following link: <https://snepmusique.com/actualites-du-snep/declaration-conjointe-des-titulaires-de-droit-sur-le-3eme-projet-de-code-de-bonnes-pratiques/>

<sup>24</sup> See notably the article “The French position on copyright in the Code of Practice aims for ‘balance’ with innovation,” accessible via the following link: [https://www.contexte.com/actualite/medias/la-position-francaise-sur-le-droit-dauteur-dans-le-code-de-bonnes-pratiques-vise-lequilibre-avec-linnovation\\_224531.html](https://www.contexte.com/actualite/medias/la-position-francaise-sur-le-droit-dauteur-dans-le-code-de-bonnes-pratiques-vise-lequilibre-avec-linnovation_224531.html)

<sup>25</sup> <https://www.cultura.gob.es/actualidad/2025/05/250430-urtasun-carta-ia.html>

<sup>26</sup> Note from the General Secretariat of the Council Delegations, Information from Italy, Portugal and Spain, *The value of the Culture and creative sectors in the development of AI: safeguarding copyright and related rights and ensuring transparency in the Code of Practice under the AI Act*, 8188/25, May 7, 2025.

safeguard copyright and related rights and to ensure the “sustainability of cultural industries”<sup>27</sup>. During the previous European “Education, Youth, Culture and Sport” Council, on November 26, 2024, the French Minister of Culture, Rachida Dati, had already expressed France’s concern regarding the effective implementation of the transparency obligation provided for by the AIA.

**The question of employment.** Beyond the identified rights infringements, the development of generative AI products has effects on the creative sector in terms of employment<sup>28</sup>. For instance, it has been noted that *“if models are able to produce synthetic replacements for [works or other protected content] at a speed and scale that surpasses humans, this may jeopardise the ability of creators to earn an income and stymie human innovation and creativity”*<sup>29</sup>.

Certain studies reveal the harmful impact of AI development on creative professions. A CISAC study asserts that creators could lose 20% of their income in the next five years<sup>30</sup>. Similarly, an American study commissioned by the Animation Guild predicts that by 2026, AI development will have negative consequences for 203,800 jobs in the American entertainment industry (in film, television, animation, video games, etc.)<sup>31</sup>. The economic model of online press publications is also particularly weakened by these developments. If generative AI solutions become search and response engines, it will no longer be necessary to consult press publication websites. Dubbers, interpreters and other similar professions are already suffering the full brunt of this AI competition.

---

<sup>27</sup> Rightholders also launched an appeal to all national EU ministers responsible for cultural policies ahead of this council, in consideration of their concerns: “Open letter to the attention of Ministers of Culture ahead of the Education, Youth, Culture and Sport Council on 12-13 May 2025,” May 6, 2025.

<sup>28</sup> See notably the survey conducted by SGDL and ADAGP, *ADAGP-SGDL Observatory. The impact of generative AIs on the activity and income of artist-authors of image and writing*, Sept. 2024: [https://res.cloudinary.com/void-sarl/image/upload/v1727251924/VDEF\\_ADAGP\\_SGDL-enque%CC%82te-web.pdf](https://res.cloudinary.com/void-sarl/image/upload/v1727251924/VDEF_ADAGP_SGDL-enque%CC%82te-web.pdf); and the survey conducted by SACEM and GEMA, *AI and music. Market development of AI in the music sector and impact on music authors and creators in Germany and France*, Jan. 2024: [https://www.goldmedia.com/fileadmin/goldmedia/Studie/2023/GEMA-SACEM\\_AI-and-Music/AI\\_and\\_Music\\_GEMA\\_SACEM\\_Goldmedia.pdf](https://www.goldmedia.com/fileadmin/goldmedia/Studie/2023/GEMA-SACEM_AI-and-Music/AI_and_Music_GEMA_SACEM_Goldmedia.pdf)

<sup>29</sup> P. Slattery, A. K. Saeri, et al., op. cit., p. 40.

<sup>30</sup> CISAC, *Study on the economic impact of Generative AI in the Music and Audiovisual industries, Complete study, Current situation and 5-year perspective*, Nov. 2024, accessible via the following link: <https://www.cisac.org/fr/Actus-Media/news-releases/une-etude-economique-mondiale-etablit-que-lia-generative-menace-lavenir>

<sup>31</sup> CVL Economics, *Future Unscripted: The Impact of Generative Artificial Intelligence on Entertainment Industry Jobs*, Jan. 2024, accessible via the following link: <https://animationguild.org/wp-content/uploads/2024/01/Future-Unscripted-The-Impact-of-Generative-Artificial-Intelligence-on-Entertainment-Industry-Jobs-pages-1.pdf>



### 1.3. The current legal framework is unsatisfactory, provoking evident legal uncertainty

**Exclusive right and exceptions.** The use of cultural content by an AI model should, at this stage, be analysed as an act of reproduction<sup>32</sup>. Despite doubts expressed by a minority of legal scholars, the European legislator seems to have provided a clue supporting this interpretation by stating—albeit in a recital—that any use of protected content requires authorisation, which would imply that such use falls within the scope of the exclusive right monopoly<sup>33</sup>. What is more, one cannot simultaneously claim the benefit of the exception (to the right of reproduction) for text and data mining while denying that an act of reproduction underpins the application of that exception. In any case, even if the reproduction is not carried out within the model itself, a copy is nonetheless made upstream, sometimes by another party. The succession of actors involved cannot erase the initial act, which may, due to its illegality—for instance, unauthorised copying in training datasets—contaminate everything that follows. An unlawful act cannot be legitimised simply by virtue of being digital<sup>34</sup>.

These uses are currently carried out, for the most part, without the authorisation of rightholders. Thus, unless the AI provider can claim an exception, the act constitutes infringement. Whether we reason in terms of European Union law, with its text and data mining exception, or U.S. copyright law and fair use, the result remains a significant degree of legal uncertainty. Paradoxically, it was precisely this same sense of legal uncertainty that justified the creation, in Article 3 of Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market, of a text and data mining exception<sup>35</sup> benefiting universities, research organisations, and cultural heritage institutions.

However, as AI capabilities have evolved in just a few years at such a rapid pace—well beyond what could have been anticipated in the past—these prior solutions have given rise to a new form of legal uncertainty.

---

<sup>32</sup> See, demonstrating the reproduction of content by generative AIs, A. F. Cooper, A. Gokaslan, A. B. Cyphert, C. De Sa, M. A. Lemley, D. E. Ho and P. Liang, “Extracting memorised pieces of (copyrighted) books from open-weight language models,” arXiv:2505.12546, May 2025, available at the following link: <https://arxiv.org/abs/2505.12546>.

<sup>33</sup> See notably recital 105 of the Artificial Intelligence Regulation, op. cit.: “General-purpose AI models, in particular large generative AI models, capable of generating text, images, and other content, present unique innovation opportunities but also challenges to artists, authors, and other creators and the way their creative content is created, distributed, used and consumed. The development and training of such models require access to vast amounts of text, images, videos, and other data. Text and data mining techniques may be used extensively in this context for the retrieval and analysis of such content, which may be protected by copyright and related rights. Any use of copyright protected content requires the authorisation of the rightholder concerned unless relevant copyright exceptions and limitations apply. Directive (EU) 2019/790 introduced exceptions and limitations allowing reproductions and extractions of works or other subject matter, for the purpose of text and data mining, under certain conditions. Under these rules, rightholders may choose to reserve their rights over their works or other subject matter to prevent text and data mining, unless this is done for the purposes of scientific research. Where the rights to opt out has been expressly reserved in an appropriate manner, providers of general-purpose AI models need to obtain an authorisation from rightholders if they want to carry out text and data mining over such works.” On this recital, see also *infra*, Part 1, pt. 2.2.1.

<sup>34</sup> The question had similarly arisen for the private copying exception and the requirement of a lawful source.

<sup>35</sup> Dir. 2019/790 of the European Parliament and of the Council of April 17, 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, recital 8.



Legal uncertainty is giving rise to litigation across the globe. Such litigation harms business activity, hinders innovation, and strengthens dominant companies (which have the resources to endure lengthy legal battles).

In any event, the situation will soon be clarified, given that a preliminary question has been referred to the Court of Justice of the European Union by a Hungarian court<sup>36</sup>. The case involves a Hungarian press publisher who claims that Google’s “Gemini” AI displays content that is partially identical to that found on the publisher’s website. Three key questions have been referred to the Court. First, does the fact that the conversational AI displays such content constitute an act of reproduction and/or communication to the public? Second, does the training of the AI—specifically, the process of training a chatbot based on a large language model—involve the right of reproduction? And finally, if the answer to the previous question is yes, does the text and data mining exception apply? While the responses to these questions are eagerly awaited due to their decisive importance, some observers have pointed out the specificity of the facts in this case, which could ultimately limit the scope or reduce the impact of the forthcoming decision<sup>37</sup>. At the very least, Member States involved in the proceedings will undoubtedly need to partially rephrase the questions, which currently lack clarity. The Court’s response is expected by the end of 2026 or the beginning of 2027 (though a referral to the Grand Chamber is not out of the question).

**The European text and data mining exception.** The text and data mining exception established by Article 4 of the 2019 Directive on copyright and related rights in the Digital Single Market<sup>38</sup>—which benefits all actors and applies to any purpose, including commercial use—raises numerous questions.

First, some rightholders dispute its applicability to the scenario at hand<sup>39</sup>, even though the AI Act appears to provide a form of confirmation<sup>40</sup> by making a clear connection between the development and training of an AI model and the text and data mining exception, particularly in Article 53 1 (c). However, no one had foreseen the potential impact of this limitation on rights when the provision was introduced by amendment. Even during its transposition into French law, the relatively muted interest expressed by cultural stakeholders at the time shows that the issues at stake were not

---

<sup>36</sup> Case “Like company v. Google Ireland Limited,” C-250/25.

<sup>37</sup> See P. Keller, “Do AI models dream of dolphins in lake Balaton?,” May 28, 2025, available at the following link: <https://copyrightblog.kluweriplaw.com/2025/05/28/do-ai-models-dream-of-dolphins-in-lake-balaton/>. The author notes in particular that the question posed concerns AI training, while the chronology of facts suggests that this case involves a pre-trained AI, which used the content in question directly and in real time (which corresponds more to RAG than to model formation).

<sup>38</sup> Ibid.

<sup>39</sup> In this regard, see notably the position of the *European Writers Council*, *EWC second Statement on the AI Act Proposal*, July 2023, accessible via the following link: [https://europeanwriterscouncil.eu/23ewc\\_on\\_aiact/](https://europeanwriterscouncil.eu/23ewc_on_aiact/) and, more broadly, *Joint Statement to Ursula von der Leyen and the new elected European Parliament on the impact of AI on the European creative community*, July 2024, accessible via the following link: [https://europeanwriterscouncil.eu/247js\\_aiimpact\\_europeancreativecommunity/](https://europeanwriterscouncil.eu/247js_aiimpact_europeancreativecommunity/)

<sup>40</sup> Regulation 2024/1689 of June 13, 2024 laying down harmonised rules on artificial intelligence, op. cit., recital 105.

fully understood<sup>41</sup>. It was only in November 2022, with the public release of ChatGPT, that awareness began to grow. It then became necessary to engage with this new tool and to understand how it worked. It also became clear that protected content had been used on a massive scale, though this took longer to grasp.

At the time of submitting this report, it appears that the forthcoming parliamentary initiative report being prepared by Axel Voss will adopt an interpretation different from that of the European Commission, challenging the applicability of the text and data mining exception to generative AI<sup>42</sup>.

Next arises the question of whether this exception complies with our international commitments, and specifically with the rule against formalities as a condition for the enjoyment and exercise of rights, as laid down in Article 5.2 of the Berne Convention<sup>43</sup>.

Moreover, this exception is particularly expropriatory in nature, as it suspends the exclusive right for the benefit of all actors and for any purpose, including commercial purposes. For this reason, it is conditioned on lawful access to the protected content and the absence of a reservation (known as an opt-out) by the rightholder, “notably through machine-readable means.”

However, it is now well established that the training datasets made available and used to train models contain pirated content. Revelations to that effect are beginning to surface. Notably, a major digital player reportedly used, to train its model, one of the largest online libraries of pirated content, which includes more than 7.5 million books and 81 million scientific articles<sup>44</sup>. Such an unlawful act of reproduction upstream could contaminate the downstream process and invalidate the claim to benefit from an exception, under both French law and U.S. law.

Likewise, some providers declare that their models are trained using Common Crawl. Yet, not everything accessible on the internet is necessarily available for free use, particularly since the very nature of cultural content, like press content, is to be disseminated to the public<sup>45</sup>.

It is also necessary to question the lawfulness of web crawling and data scraping activities. Whether these activities can benefit from the text and data mining exception should be considered highly uncertain, insofar as the very definition of the exception implies a purpose

---

<sup>41</sup> In line with this observation, see *Transposition of text and data mining exceptions*, CSPLA report, pres. A. Bensamoun, Dec. 2020, accessible via the following link: <https://www.culture.gouv.fr/nous-connaître/organisation-du-ministère/Conseil-supérieur-de-la-propriété-littéraire-et-artistique-CSPLA/travaux-et-publications-du-cspla/missions-du-cspla/Mission-du-CSPLA-sur-les-exceptions-de-fouille-de-textes-et-de-données-text-and-data-mining>

<sup>42</sup> *Copyright and generative artificial intelligence – opportunities and challenges*, 2025/2058(INI), A. Voss: [https://oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference=2025/2058\(INI\)](https://oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference=2025/2058(INI)).

<sup>43</sup> Berne Convention for the Protection of Literary and Artistic Works (amended Sept. 28, 1979), art. 5.2. – See J. C. Ginsburg, “Berne-Forbidden formalities and mass digitisation,” *Boston University Law Review*, vol. 96:745, p. 745.

<sup>44</sup> See A. Reisner, “The unbelievable scale of AI’s pirated-books problem,” *The Atlantic*, March 20, 2025, accessible via the following link: <https://www.theatlantic.com/technology/archive/2025/03/libgen-meta-openai/682093/>

<sup>45</sup> For an analysis of these unauthorised uses, see notably Rights alliance for the creative industries on the internet, *Report on pirated content used in the training of generative AI*, March 2025.

behind the data collection—namely, the extraction of information from the collected data. In the case of

these two activities, and given that the actors involved can be numerous, that purpose is far from always being fulfilled<sup>46</sup>.

Moreover, the inefficacy of the opt-out mechanism is problematic. Not only is there no standardised method, but the press has also denounced the fact that opt-outs are not always respected. On top of that, the obligation is excessively burdensome—if not impossible—for rightholders to implement, as they are not necessarily responsible for every instance in which their content is made available.

Knowing these operational challenges, DG CONNECT (the Directorate-General for Communications Networks, Content and Technology within the European Commission) is considering a project to create a European opt-out register that could consolidate all refusals to allow the use of cultural content for training AI models<sup>47</sup>. The work carried out by Finland and Estonia, who had already begun reflecting on the technical instrument upstream, led the Commission to launch the Copyright Infrastructure Task Force, which now includes twelve Member States (with France participating as an observer) and is working on the register. The European Union Intellectual Property Office (EUIPO) is also supporting the creation of an opt-out database<sup>48</sup>. Rightholders have nonetheless voiced concern over the legal implications of such a register. It would be unacceptable, for instance, if the absence of registration were to be interpreted as a presumption of authorisation, effectively imposing a formality in order to be protected, which is expressly prohibited by the Berne Convention<sup>49</sup>. The cost and potential liability associated with such a system also raise serious questions. In any case, the value of an opt-out register is questionable, especially when the ambition to create a functioning market is in fact based on an opt-in logic that respects the full chain of rights.

The ineffectiveness of the exception's conditions casts doubt on its legitimacy. Should a legal rule that cannot be effectively applied not be suspended? Furthermore, it is likely that the exception would fail the three-step test. Indeed, is the "special case" requirement—the first of the three conditions—met when the use of content is both massive and sprawling? Moreover, does not the exception interfere with the normal exploitation of the work—the second condition—due to the competition it creates between the exception and the potential market<sup>50</sup>?

---

<sup>46</sup> Furthermore, such an extension of the benefit of the exception would probably not meet the "special case" condition of the three-step test and would create unjustified prejudice to the legitimate interests of the holder. The absence of opposition to web scraping (for indexing) cannot in this sense constitute authorisation to mine. – See, criticising a Hungarian decision, P. Mezei, "Third European Court decision on the general purpose TDM exception is out," Kluwer Copyright Blog, May 8, 2025: <https://copyrightblog.kluweriplaw.com/2025/05/08/third-european-court-decision-on-the-general-purpose-tdm-exception-is-out/>.

<sup>47</sup> On the exception, the Commission launched a call from January to February 2025 which should result in a feasibility study of a central opt-out registry. Information is accessible via the following link: <https://digital-strategy.ec.europa.eu/en/funding/call-tenders-feasibility-study-central-registry-opt-outs-under-text-and-data-mining-tdm-exception>

<sup>48</sup> EUIPO, "The development of generative artificial intelligence from a copyright perspective," May 2025: [https://www.europarl.europa.eu/meetdocs/2024\\_2029/plmrep/COMMITTEES/JURI/DV/2025/05-12/2025.05.12\\_item6\\_Study\\_GenAIfromacopyrightperspective\\_EN.pdf](https://www.europarl.europa.eu/meetdocs/2024_2029/plmrep/COMMITTEES/JURI/DV/2025/05-12/2025.05.12_item6_Study_GenAIfromacopyrightperspective_EN.pdf)

<sup>49</sup> Berne Convention for the Protection of Literary and Artistic Works (amended Sept. 28, 1979), art. 5.2: "the enjoyment and the exercise of [these] rights shall not be subject to any formality." On the subject, see notably J. C. Ginsburg, "Berne-Forbidden formalities and mass digitisation," op. cit. Independent of the value of this registry, on the risk that the opt-out is already in contradiction with the aforementioned article, see supra.

<sup>50</sup> On the infringement of the normal exploitation of the work, but through the prism of American law, see notably the decision "Thomson Reuters v. Ross intelligence," Delaware District Court, Feb. 11, 2025 (on which see infra,

Finally, are not the legitimate interests of the rightholder—the third and final condition—harmed both by the absorption of content at various stages (pre-training, fine-tuning, etc.) and by the resulting output which may, at a minimum, imitate the artist’s distinctive “style” and potentially infringe on their moral rights?

In any event, the text and data mining exception, even if it were deemed applicable, could only be implemented for the pre-training phase<sup>51</sup>, or possibly for the fine-tuning phase (though this too remains debatable, as fine-tuning is already a refinement stage). It would not, however, apply to the RAG (retrieval-augmented generation) phase, which involves an external “connection” to a database of relevant answers. In such a case, the data is used directly in generating responses but is not “analysed” to build the model, despite the fact that analysis is a defining element of text and data mining<sup>52</sup>.

Thus, even assuming that all such doubts regarding the text and data mining exception could be resolved, its application would, at the very least, depend on the specific stage at which the protected content is used. This would require different legal regimes for each stage at a time when what is actually needed is unity and clarity.

**The U.S. fair use exception.** In the United States, fair use—a kind of meta-exception on the basis of which a judge can determine, case by case, whether a use is “fair” and thus permitted despite copyright protection—may not be applied as easily as AI providers might hope<sup>53</sup>. U.S. law sets out four criteria for determining whether an act qualifies as fair use: (1) “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work”<sup>54</sup>.

---

introduction, pt. 1.3), accessible via the following link:  
<https://storage.courtlistener.com/recap/gov.uscourts.ded.72109/gov.uscourts.ded.72109.770.0.pdf>

<sup>51</sup> For a critical analysis of the implementation of the exception, see notably T. W. Dornis, “The training of generative AI is not text and data mining,” *European Intellectual Property Review (E.I.P.R.)*, 2/2025, accessible via the following link: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4993782](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4993782)

<sup>52</sup> Art. 2.2 of directive 2019/790, which defines text and data mining as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.”

<sup>53</sup> See notably OpenAI’s contribution to the consultation launched by the White House, in that it seeks a broad reading of the American exception in order to allow facilitated learning use, see *infra*, introduction, pt. 3.

<sup>54</sup> USC, title 17, section 107: “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors”.

However, a recent decision, *Thomson Reuters v. Ross Intelligence*<sup>55</sup>, highlights that the fourth fair use factor—concerning the effect of the use upon the potential market or value of the copyrighted work—could stand in the way of applying the exception. This point had already been made by Professor Jane C. Ginsburg during her remarks at the “Culture” roundtable at the AI Action Summit on February 10, 2025. Along similar lines, in one of the many ongoing lawsuits in the United States, ten law professors specialising in intellectual property submitted an *amicus* brief in April 2025 outlining why fair use should not apply to AI training<sup>56</sup>. They specifically argued that outputs generated by LLaMA compete directly with human-created works.

In this regard, a decisive element of the *Thomson Reuters v. Ross Intelligence* ruling is the judge’s assertion that, in assessing the fourth fair use factor, one must consider “not only current markets but also potential derivative ones that creators of original works would in general develop or license others to develop”<sup>57</sup>.

In other words, the potential emergence of a market developed by rightholders is a relevant factor in determining whether a use is fair. By using protected content without authorisation, AI providers may negatively impact a market that rightholders could have developed in the future, and therefore cannot benefit from the fair use exception. This analysis closely mirrors the “normal exploitation of the work” criterion that is part of the three-step test under international copyright law<sup>58</sup>.

It is also worth noting that the **U.S. Copyright Office** published its much-anticipated pre-report on generative AI training in May 2025<sup>59</sup>. They state that using vast quantities of copyrighted works for commercial purposes to generate creative content that competes in existing markets, especially when done via unlawful access to those works, exceeds the established boundaries of fair use.

Just as the U.S. judge in question recognised, from a fair use perspective, the harm caused to a developing potential market, so European and French judges could similarly conclude that AI’s use of protected content fails to satisfy the three-step test, thereby neutralising the application of the text and data mining exception, even if it were otherwise deemed applicable.

---

<sup>55</sup> See the decision “*Thomson Reuters v. Ross intelligence*,” Delaware District Court, Feb. 11, 2025, op. cit. accessible via the following link: <https://storage.courtlistener.com/recap/gov.uscourts.ded.72109/gov.uscourts.ded.72109.770.0.pdf>

<sup>56</sup> *Amicus Brief of Copyright Law Professors*, in R. “Kadrey, et. al., v. Meta,” Case No. 3:23-cv-03417-VC: <https://storage.courtlistener.com/recap/gov.uscourts.cand.415175/gov.uscourts.cand.415175.525.0.pdf>

<sup>57</sup> Ibid.

<sup>58</sup> See supra, introduction, pt. 1.3.

<sup>59</sup> <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf>, p. 107: “making commercial use of vast troves of copyrighted works to produce expressive content that competes with them in existing markets, especially where this is accomplished through illegal access, goes beyond established fair use boundaries”. – Following the publication of this pre-report, Shira Perlmuter, Director of the Office, was dismissed by the White House on May 10, 2025.

## 2. The meeting of needs

**Beginnings of a market.** At this stage, the task force observes that while the structure of the market is still in its early stages, it remains the key condition for ensuring remuneration in return for the use of content. This finding is supported by the fact that expectations on both sides have been clearly identified and, more importantly, that needs are aligned. Demand (2.1) and supply (2.2) must be given the means to come together (2.3).

### 2.1. Demand

**Risk of degeneration.** On one hand, AI providers need high-quality, human-generated data that is well-organised, easily accessible, and usable under secure and clearly defined conditions.

There is a recognised risk of model degeneration when training occurs in a “closed loop,” relying on data that has itself been generated by AI<sup>60</sup>. Although some recent studies have qualified this conclusion—at least when it suggests the risk of complete model collapse over time—they nonetheless continue to affirm that maintaining “a sufficient proportion of real data and [integrating] human curation as a safeguard” are essential conditions for the continued viability of AI models<sup>61</sup>.

**Unquenched thirst for data.** Furthermore, the need for data has not diminished; on the contrary, it is increasing as models become more advanced and more numerous. Some AI specialists have even pointed to the stagnation in the performance of large language models, noting that a large portion of the “available” data on the internet has already been used. Thus, clear demand exists<sup>62</sup>.

---

<sup>60</sup> On this risk, see the legal interim note, op. cit., which refers notably to I. Shumailov, Z. Shumaylov, Y. Zhao, N. Papernot, R. Anderson, Y. Gal, “AI Models collapse when trained on recursively generated data,” *Nature*, 2024, volume 631, p. 755 et seq. The study is accessible via the following link: <https://www.nature.com/articles/s41586-024-07566-y>. See also the demonstration made in the economic interim note of the present task force (J. Farchy, Dec. 2024, available online).

<sup>61</sup> In this regard, see INRIA, “Towards a risk of generative AI collapse?,” Feb. 20, 2025, accessible via the following link: <https://www.inria.fr/fr/risque-effondrement-collapse-ia-generatives>

<sup>62</sup> In this regard, see notably the request made by France Digitale, which concerns quality datasets in exchange for flat-rate remuneration at the pre-training stage. Add. their report, *Generative AI and copyright: what place for protected European data in the AI era? Our proposals for a balance between innovation and culture*, Dec. 2024, p. 13: “Foundation model developers need massive amounts of diverse data because they sell a generic product. Consequently, their only differentiating factor from the competition (apart from related services and price) is the performance of their model, which can be improved by optimising the algorithms and the training dataset. For companies that fine-tune foundation models, on the other hand, value lies in specialisation. This can be achieved by adapting, for those that allow it, the model parameters, but especially by using a high-quality training dataset. These companies are therefore more likely to pay licences or negotiate agreements to access otherwise unavailable data and iterate over several months to find the best training data mix. While for some, announcing such agreements is a marketing argument, the majority of companies prefer to keep information about their training dataset secret.”



**Data quality.** Lastly, it is well established that the quality of cultural data can significantly improve a model’s performance<sup>63</sup>. The EU is fully aware of this need, not least because it is also a matter of European sovereignty. In this regard, the Commission’s action plan to make Europe the “AI continent,”<sup>64</sup> unveiled on April 9, 2025, includes a strategy for a “Data Union,” aimed at facilitating access to “high-quality data” while respecting copyright. The connection is clear.

Thus, to avoid a kind of deadly inbreeding for AI models (fed exclusively with synthetic content), the use of cultural content—high-quality, human-made content—is essential.

## 2.2. Supply

**Breadth of supply.** On the other hand, rightholders wish to preserve their economic model. Chief among their concerns is the preservation of their monopoly and the remuneration that naturally follows from exercising it. While a text and data mining exception does exist and could potentially weaken that monopoly, it is subject to conditions, and its implementation in this domain remains uncertain<sup>65</sup>.

Meanwhile, although the opt-out mechanism has been widely used, care must be taken not to systematically interpret the meaning of this refusal on the part of rightholders.

Indeed, while some stakeholders may express absolute opposition—seeing any authorisation for use as a kind of Faustian bargain—others are not categorically opposed to the use of their content; instead, they express a desire for such use to be based on prior authorisation and teamed with appropriate compensation.

To this end, the task force was granted access to numerous letters from rightholders addressed to AI providers proposing to enter into negotiations. Most of these received no response, and meaningful discussions have proved extremely rare.

---

<sup>63</sup> In this regard, American researchers have proved that the use of BOOK3, which contains numerous pirated contents, improves model performance. See especially S. Jia and A. Nagaraj, “Cloze Encounters: The Impact of Pirated Data Access on LLM Performance,” Berkeley, Feb. 10, 2025.

<sup>64</sup> [https://ec.europa.eu/commission/presscorner/detail/fr/ip\\_25\\_1013](https://ec.europa.eu/commission/presscorner/detail/fr/ip_25_1013)

<sup>65</sup> On which see *supra*, introduction, pt. 1.3.



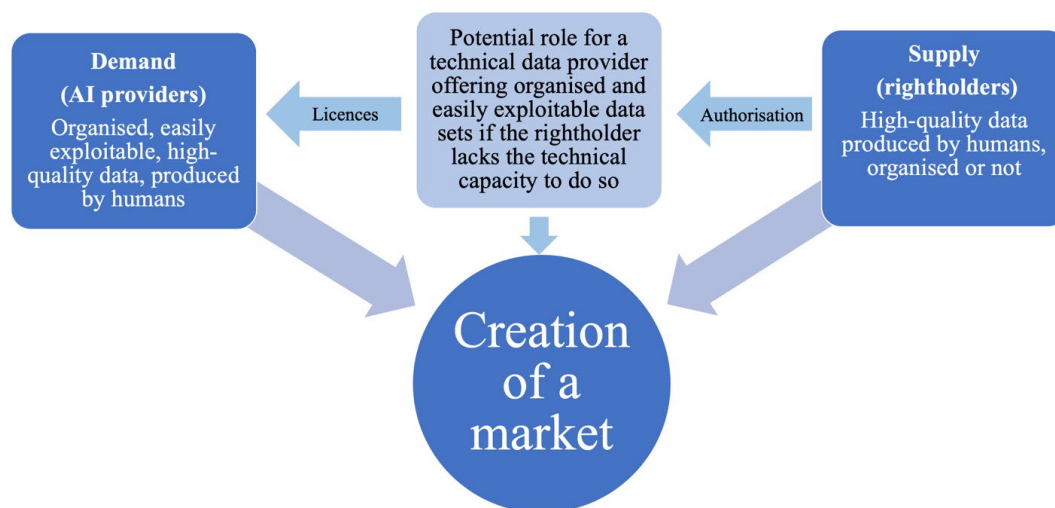
### 2.3. Making supply and demand meet

**A difficult encounter.** Thus, there is supply corresponding to the demand previously identified. Yet, the stakeholders seem to struggle to initiate discussions and to bring together wills that are, in principle, aligned. This difficulty can be explained in several ways.

First, legal uncertainty fosters a climate of mistrust, which discourages dialogue and therefore the signing of contracts.

Second, in practice, the opacity surrounding training data sources is a major obstacle. A lack of transparency reinforces the deadlock, since rightholders are kept in the dark while the use of protected content appears to be ongoing. On this point, signals coming from Brussels appear particularly unfavourable.

Finally, there may be technical reasons behind this hesitation. It is possible that the content offered by rightholders or their representatives is not sufficiently organised or annotated, or that they are simply unable to supply content in mass quantities and usable formats, making this supply less attractive to AI providers. This difficulty in providing structured content is all the more significant now that smaller, specialised models are gaining ground over large, general-purpose models. Consequently, the need for well-organised, high-value, specialised data is likely to increase in the future. This obstacle is by no means insurmountable. A technical data provider could, where appropriate, act as an intermediary with the rightholders' authorisation to offer technically usable datasets<sup>66</sup>.



<sup>66</sup> On this proposal, see *infra*. Part 3, pt. 3.2.

**A technically feasible solution.** One final point appears essential at this stage. The creation of the kind of market under discussion is technically feasible. Occasionally, AI providers argue that it is practically impossible to produce contracts for each individual piece of content. This is a perfectly understandable argument, and the task force by no means envisions the signing of one contract per piece of content, which would be akin to the well-known metaphor of trying to fill the ocean with a teaspoon. Demand is, at least potentially<sup>67</sup>, vast. To be effective, any authorisations would therefore need to be conceived broadly. The creation of catalogues—by rightholders themselves, by collective management organisations, and/or via a technical data provider<sup>68</sup>—already offers a concrete response to this challenge.

**Fostering willingness.** The market thus has everything it needs to emerge. Ultimately, the situation described here resembles a classic supplier-client relationship, with both parties acting as market players holding negotiating power. In this respect, organising the sector through the lens of competition law should not be overlooked<sup>69</sup>.

This does, however, raise the question of the right moment for regulatory intervention (understood as encouragement from public authorities) to support this movement. Far from being secondary, this question is in fact crucial. History offers many examples of how important swift action can be, with such action proving the only way to avoid the risk of stagnation, which would be detrimental to rightholders. The current assessment seems to be that, while supply and demand are capable of meeting, the necessary willingness may be lacking. In this regard, the launch in France of a consultation led by the Ministry of Culture and the Ministry of AI represents a strong political signal in favour of dialogue aimed at developing this market<sup>70</sup>. The goal of this consultation is “to forge common solutions through dialogue between AI providers and rightholders, in order to ensure a secure framework for the development of trustworthy AI that serves our societal model and economy”<sup>71</sup>.

### 3. Time for reflection

**The risk of time slipping away.** It seems essential that a fair framework be established now. The recent history of literary and artistic property law shows that a deadlock can quickly become entrenched, and in consequence can practically deprive

---

<sup>67</sup> The development of small models, which require less data, qualifies this analysis.

<sup>68</sup> On this diversity of hypotheses, see *infra*, Part 3, pt. 3.

<sup>69</sup> On the subject, see notably Competition Authority, *Opinion 24-A-05 of June 28, 2024 relating to the competitive functioning of the generative artificial intelligence sector*, accessible via the following link: [https://www.autoritedelaconurrence.fr/sites/default/files/integral\\_texts/2024-07/24a05\\_merged.pdf](https://www.autoritedelaconurrence.fr/sites/default/files/integral_texts/2024-07/24a05_merged.pdf). See also *infra*, Part 3, pt. 1.

<sup>70</sup> Launch of a consultation between generative AI developers and cultural rightholders, April 23, 2025. On this consultation, see *infra*, Part 1, pt. 2.1.1.

<sup>71</sup> Remarks reported by I. Szczepanski, “Conciliation between AI and rightholders: Rachida Dati wants to bring about a common framework,” *Electron libre*, June 4, 2025, available at the following link: <https://electronlibre.info/articles/100578-conciliation-entre-ia-et-ayants-droit-rachida-dati-veut-faire-emerger-un-cadre-commun/>

rightholders of the exercise of their rights. In this regard, the establishment, in the so-called “e-commerce” directive of June 8, 2000<sup>72</sup>, of limited liability to the benefit of hosting providers had, for many years, allowed contributory platforms—most of which emerged after this rule was adopted—to shelter behind this qualification in order to escape responsibility, generating profits linked to the use of cultural content from which rightholders were excluded. The debate around the notion of value sharing between these digital actors and the rightholders whose content was made publicly available proved tumultuous and long-lasting. It was only with Directive 2019/790 of April 17, 2019<sup>73</sup>, obtained after a hard-fought struggle, that literary and artistic property rights once again became enforceable by application of Article 17 of the European regulation<sup>74</sup>.

In a similar vein, in the case of AI, the European legislator adopted a text and data mining exception without anticipating the sudden emergence of generative models that now benefit from it. The analogy holds: digital actors benefit from a form of protection—here, through a derogation from the monopoly—that the legislator might not have granted in the same terms, had they been aware of future uses.

Time probably plays strongly against the protection of rights. The longer this situation persists, the harder it will prove to dismantle an ecosystem based on unauthorised use, as evidenced by the nearly two decades that passed between the e-commerce directive and the exception ultimately provided by Article 17 of Directive 2019/790 regarding limited liability for the use of protected literary and artistic works.

The analogy is all the more meaningful because the provision in the 2019 directive incentivised negotiation. Following its adoption, contracts were indeed concluded between platforms and rightholders, whose position was thus finally restored in the value chain. A similar objective must guide current reflections on the subject, so that a transparent and sustainable framework for the use of cultural content in the AI era can emerge.

An additional difficulty reinforces this imperative for reflection. Whereas hosting providers could remove content from sharing platforms (and although this possibility was occasionally ignored), it is impossible, given the current state of technology, to require AI model providers to adjust their model so as to selectively forget what has been learned from unauthorised content, because unlearning techniques are not yet effective. The radical option of destroying the model to proceed with new

---

<sup>72</sup> Dir. 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Electronic Commerce Directive”).

<sup>73</sup> Dir. 2019/790 of the European Parliament and of the Council of April 17, 2019 on copyright and related rights in the Digital Single Market, op. cit.

<sup>74</sup> Proposing this return to the opposability of law due to the “active role” of these actors, see CSPLA, Report of the task force, *Linking directives 2000/31/EC and 2001/29/EC*, P. Sirinelli, J.-A. Benazeraf and A. Bensamoun, Nov. 2015, available online.

training on data purged of unauthorised content would seem difficult to sustain, given the very high costs associated with developing such models. However, the past cannot simply be erased, and the passage of time does little to soothe these relationships.

**The right moment.** It is therefore necessary to consider different possible solutions before a new “safe harbour” becomes entrenched, especially since providers here have an “active role” as and when they supply the AI with content. The task force thus considers that a swift, though by no means rushed, intervention will prevent the establishment of a durable environment that would fail to respect rights and be difficult to dismantle. The form of such an intervention can be multiple, and this report aims to be a source of proposals without insisting on a single solution, or a single expression of that solution.

Nonetheless, taking a clear position appears imperative, particularly as some major American AI providers now invoke the lack of respect for literary and artistic property rights rules by certain states (notably China) to argue for an extended fair use that would favour AI training with only a limited concern for rights<sup>75</sup>. Conversely, voices from the cultural industries are calling on the U.S. government to preserve culture<sup>76</sup>.

It is interesting to note here that the recent controversy around AI imitating the style of Studio Ghibli prompted Sam Altman, CEO of OpenAI, to declare at a conference that reflection was underway towards finding a remuneration model benefiting creators when they are cited in prompts to obtain content generated “in the style of,” based on an opt-in system<sup>77</sup>.

Thus, it is time to put forward a balanced model, as advocated by the President of the French Republic at the conclusion of the AI Action Summit in February 2025<sup>78</sup>, which would enshrine the

---

<sup>75</sup> See in this regard, OpenAI’s response to the consultation launched by the White House in the perspective of a future action plan on AI. The response is accessible via the following link: <https://cdn.openai.com/global-affairs/ostp-rfi/ec680b75-d539-4653-b297-8bcf6e5f7686/openai-response-ostp-nsf-rfi-notice-request-for-information-on-the-development-of-an-artificial-intelligence-ai-action-plan.pdf>

<sup>76</sup> The appeal comes from 400 Hollywood figures and points to the risk of massive harm to the entertainment industry in the absence of regulation and protection of rights, and has been widely reported in the press: see notably the article accessible via the following link: [https://www.huffingtonpost.fr/culture/article/mark-ruffalo-cate-blanchett-paul-mccartney-400-stars-de-hollywood-contre-l-ia-en-appellent-a-trump\\_247626.html#:~:text=%C2%AB%20Nous%20sommes%20convaincus%20que%20le,et%20technologique%20du%20gouvernement%20am%C3%A9ricain.](https://www.huffingtonpost.fr/culture/article/mark-ruffalo-cate-blanchett-paul-mccartney-400-stars-de-hollywood-contre-l-ia-en-appellent-a-trump_247626.html#:~:text=%C2%AB%20Nous%20sommes%20convaincus%20que%20le,et%20technologique%20du%20gouvernement%20am%C3%A9ricain.)

<sup>77</sup> The remarks, made during a TED conference in April 2025, were reported by the press. See for example the article accessible online: <https://www.businesstoday.in/technology/news/story/it-would-be-cool-says-openai-ceo-sam-altman-hints-at-new-model-to-pay-artists-471890-2025-04-14>. The OpenAI co-founder stated: “I think it would be cool to figure out a new model where if you say I want to do it in the name of this artist and they opt in, there’s a revenue model there that’s okay”.

<sup>78</sup> E. Macron, concluding speech (oral remarks), Summit for AI Action, February 11, 2025, Grand Palais: the President of the Republic advocated for the construction of “trustworthy AI” and a European framework that, notably, “respects creativity, copyright, related rights, which allows all rightholders to make a living from their art.”

need to protect cultural content while promoting the development of a European AI ecosystem. The various stakeholders find themselves at a crossroads: the path taken will also symbolise the values—both technological and civilisational—that will ultimately prevail in the eyes of policymakers.

As the French Minister of Culture, Rachida Dati, stated, “the time has come to assert European cultural sovereignty,” understood as both a “declaration of autonomy” and a “capacity for influence”<sup>79</sup>.

**A caveat: the question of territorial scope in these solutions.** The issue of the territorial reach of the adopted rules should receive particular attention. An extraterritorial application—similar to that concerning buy-out agreements<sup>80</sup>—would allow non-European actors who have entered or wish to enter the European market to be subject to the legal framework in place. This question is key, and has already been raised regarding the territorial scope of copyright and related rights, including the text and data mining exception. For example, representatives from American cultural industries recently argued, in a submission to the White House consultation on tariffs applied to American companies, that the inherent ambiguity of the exception established in certain states necessarily results in negative consequences worldwide, due to the intrinsically borderless nature of the exploitation of online content<sup>81</sup>.

There are several possible avenues to grant extraterritorial scope to the solutions. Notably, a combined reading of the AIA (the extraterritorial reach of which is clear<sup>82</sup>) and the directives relating to copyright and related rights referenced by the regulation<sup>83</sup>,

---

<sup>79</sup> R. Dati, Comment column, *Les Echos*, May 12, 2025.

<sup>80</sup> Art. L. 132-24, al. 2 CPI: “The contract by which the author of the musical composition with or without lyrics of an audiovisual work transfers all or part of his exploitation rights to the producer of the latter cannot have the effect, notwithstanding the law chosen by the parties, of depriving the author, for the exploitation of his work on French territory, of the protective provisions provided for in articles L. 131-4, L. 131-5 and L. 132-28 of this code.” The national legislator introduced this provision with the ordinance of May 12, 2021, after noting that the directive of June 17, 2019 left open a breach regarding extra-European contracts: compliance with a certain number of rules, among which those that establish the principle of proportional remuneration, cannot thus be neutralised by the inclusion of an *electio juris* clause, the mandatory character of these rules thus imposing itself despite the possible designation of foreign law by the parties.

<sup>81</sup> *DCC Written Comments in Response to USTR’s Request for Comments Regarding Unfair Trade Practices by Other Countries* (Docket No. USTR-2025-0001), accessible via the following link: <https://thescl.com/news/dcc-submits-comments-on-unfair-trade-practices/>; notably p. 5: “The borderless nature of digital exploitation means that negative impacts of one nation’s TDM exception would be global as AI models trained in one country on American creative content without consent from, or compensation to, U.S. rightholders would be exploited around the world. Such global copyright arbitrage would deny the creative community the opportunity to license their content for training and would contravene international copyright treaties, including the three-step test contained in U.S. free trade agreements as well as the Berne Convention, TRIPS Agreement, WIPO Internet Treaties, and other international agreements.”

<sup>82</sup> Art. 2 AIA.

<sup>83</sup> Art. 53, 1, c) AIA: “[providers of general-purpose AI models shall] put in place a policy to comply with Union law on copyright and related rights, and in particular to identify and comply with, including through state-of-the-art technologies, a reservation of rights expressed pursuant to Article 4 (3) of Directive (EU) 2019/790.”

could allow the solutions created to protect the interests of rightholders to acquire, by extension, the same territorial scope. Recital 106 of the Regulation<sup>84</sup> seems to support this proposition. Failing that, the competitive advantage would be obvious.

Furthermore, the interpretation of the territorial scope of the rules must be imperatively guided by the “useful effect” principle, often raised by the Court of Justice of the European Union. In a comprehensive approach to the subject, including both the exercise of the right and its implementation modalities (with transparency), the criterion retained could be that of the targeted public. In such a case, European law would be broadly applicable.

The task force nevertheless stresses the complexity of this question, which requires the subject to be studied in its own right<sup>85</sup>.

\*\*\*\*\*

**The potential construction of a market: plan.** An effective and efficient framework is therefore essential to meet these two expectations, which combine to shape the market of the future: preserving rights on cultural content; and promoting the negotiation and signing of licensing contracts to ensure the lawful use of content by AI, if necessary by introducing facilitating solutions. Indeed, it is not only necessary (Part 1), but also possible (Part 2) to create and implement (Part 3) an ethical, sustainable, and secure market, the only path forward that will establish lasting trust not just between stakeholders but also with the public at large.

The proposals that follow (Part 4) are nevertheless intended to be grounded in the present context. Changes in circumstances could require the revision of both the recommendations themselves and the modalities of their implementation.

---

<sup>84</sup> AIA, recital 106: “Providers that place general-purpose AI models on the Union market should ensure compliance with the relevant obligations in this Regulation. To that end, providers of general-purpose AI models should put in place a policy to comply with Union law on copyright and related rights, in particular to identify and comply with the reservation of rights expressed by rightholders pursuant to Article 4 (3) of Directive (EU) 2019/790. Any provider placing a general-purpose AI model on the Union market should comply with this obligation, regardless of the jurisdiction in which the copyright-relevant acts underpinning the training of those general-purpose AI models take place. This is necessary to ensure a level playing field among providers of general-purpose AI models where no provider should be able to gain a competitive advantage in the Union market by applying lower copyright standards than those provided in the Union”.

<sup>85</sup> A task force at CSPLA, entrusted to Prof. Tristan Azzi, has just been launched on the law applicable to generative AI models marketed in the European Union: <https://www.culture.gouv.fr/fr/nous-connaitre/organisation-du-ministere/Conseil-superieur-de-la-proprietee-litteraire-et-artistique-CSPLA/travaux-et-publications-du-cspla/missions-du-cspla/le-cspla-lance-une-mission-sur-la-loi-applicable-aux-modeles-d-ia-generative-commercialises-dans-l-union-europeenne>

*The quest for balance between preserving human creativity and developing AI and its products is a guiding thread that should steer the reflection on creating an ethical and competitive European market.*

*This reflection is intended to be a starting point rather than an end point. It does not claim to offer a “turnkey” solution, but rather avenues—doubtless to be refined—that will help advance the debate.*

## **PART 1. THE NEED FOR A MARKET**

**The influence of transparency.** It is essential—as well as practically achievable—for a market to form. However, this prospect will only be possible if the current situation changes, since no confidence can arise under present conditions.

Thus, opacity prevents ensuring the indispensable preservation of the right to an effective remedy for rightholders (1.), which undermines their rights (both procedural and substantive) and generates legitimate mistrust and suspicion. The situation is all the more problematic because the solutions currently being developed at the European level do not seem to aim for a very high degree of transparency, making it important to identify alternative solutions now (2.).

### **1. The indispensable preservation of the right to an effective remedy**

**Identification of the problem regarding the right to proof.** The legal uncertainty prevailing today is problematic because no sustainable market can emerge in this context. These difficulties manifest themselves at the evidentiary level: the rightholder must be able to identify the use—potentially unlawful given the particularly uncertain nature of present exceptions—of their content. Yet, there is significant opacity in this area, which prevents enforcement and thus respect for rights.

Current discussions at the European level, notably regarding the Code of Practice, do not appear to aim at a very high degree of protection for rightholders, who have already begun to express concern publicly about the consequences that would inevitably arise from a low level of transparency<sup>86</sup>.

Therefore, the right to evidence—which must be guaranteed—should be made effective through transparency; failing that, alternative solutions must be found.

**A tenuous hope for high transparency.** First, if a high level of transparency is enshrined in the template to be developed by the AI Office<sup>87</sup>, then the rightholders' right to evidence will be technically guaranteed. Transparency is imposed in this context as a prerequisite—even a lever—for creating a secure market.

The approach taken in the template will determine whether this first path is available. If transparency is ensured with sufficient precision, then rightholders

---

<sup>86</sup> In this regard, see notably the joint declaration of authors, performers and other rightholders active in the cultural and creative sectors of the EU and accessible via the following link: <https://eurocinema.eu/28-03-2025-ia-code-de-bonnes-pratiques-draft-iii-declaration-commune-dauteurs-dartistes-interpretes-et-dautres-titulaires-de-droits-actifs-dans-les-secteurs-culturels-et-creatifs-de-lue/>. On the subject, see already introduction, pt. 1.2.

<sup>87</sup> On this requirement and the form of its implementation, see *Report task force on the implementation of the European regulation establishing harmonised rules on artificial intelligence* (“template”), CSPLA, pres. A. Bensamoun, Dec. 2024, accessible via the following link: <https://www.culture.gouv.fr/nous-connaître/organisation-du-ministère/Conseil-supérieur-de-la-propriété-littéraire-et-artistique-CSPLA/Travaux-et-publications-du-CSPLA/Missions-du-CSPLA/ia-et-transparence-des-données-d-entraînement-publication-du-rapport-d-alexandra-bensamoun-sur-la-mise-en-œuvre-du-règlement-européen-etablisant>



will be able to identify and, where applicable, negotiate or challenge the use of their content.

It should also be recalled that transparency is technically possible<sup>88</sup>, even if sometimes complicated due to: the volume of data; the multiplicity of actors involved (especially in the constitution of databases); the compression of metadata; and the absence of effective and interoperable recognition mechanisms. However, if the selection of incoming data represents a risk, it must generally be assumed by the actor developing the activity in question.

The task force on the implementation of the AIA<sup>89</sup> briefly summarised this transparency obligation, the content of which is vague and sometimes contested in its relevance, by using a culinary metaphor: “all the ingredients but not the recipe.”

However, early European feedback, notably in the third draft of the Code of Practice—which will include the implementation of the compliance policy under Article 53 1 (c) of the AIA—published on March 11, 2025<sup>90</sup>, does not appear to lean towards a high level of requirement for AI providers. Rightholders notably criticise the draft for completely ignoring the contractual route, especially licences<sup>91</sup>. On this point, Alexander Peukert, co-chair (copyright law) of Working Group 1 on “Transparency and Copyright Rules” during the development of the Code of Practice, considers that the compliance obligation with copyright and related rights is limited to prohibiting rights infringement, and cannot extend to a necessity to obtain a licence<sup>92</sup>. For these reasons, rightholders today prefer to exclude the subject from the Code of Practice, thereby allowing more time for reflection.

The situation is no clearer regarding the template or “sufficiently detailed summary” model—Article 53 1 (d) of the AIA—which will be provided by the AI Office, but for which no detailed draft has yet been communicated.

The separation of these two topics is detrimental to the establishment of an overall balance. The task force on the implementation of the AIA had, moreover, recommended a combined treatment of the two subjects.

---

<sup>88</sup> On this technical possibility, see notably S. Stober, “Possibilities of Source Documentation and Disclosure for Generative AI Systems,” Feb. 2025, accessible via the following link: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5165118](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5165118)

<sup>89</sup> *Report Task Force on the implementation of the European regulation establishing harmonised rules on artificial intelligence ("template")*, CSPLA, Dec. 2024, op. cit.

<sup>90</sup> Third version of the Code of Practice, accessible via the following link: <https://digital-strategy.ec.europa.eu/en/library/third-draft-general-purpose-ai-code-practice-published-written-independent-experts>. The analysis is based notably on the notion of “best efforts” (or “reasonable measures”). Ibid., “*Measure I.2.3. Identify and comply with rights reservations when crawling the World Wide Web*,” pt. 4: “Signatories will take reasonable measures to enable affected rightholders to obtain information about the web crawlers employed and their robot.txt features and the measures that a Signatory adopts to identify and comply with rights reservations expressed pursuant to Article 4 (3) of Directive (EU) 2019/790 at the time of crawling, for example by making public such information and syndicating a web feed that covers every update of the website informing about the rights reservation compliance”.

<sup>91</sup> On this contractual approach, see *infra*, Part 2, pt. 2.

<sup>92</sup> A. Peukert, conference, “AI & IP: a love-hate relationship?”, APRAM/ECTA, Univ. Panthéon-Sorbonne, Apr. 3, 2025.

The official publication of these two documents was expected on May 2<sup>93</sup>, but a delay has been announced. It should be recalled that the obligations concerning copyright and related rights will apply from August 2, 2025.

**Guarantee of the right to proof in the absence of high transparency.** Furthermore, if a high degree of transparency proves lacking, rightholders' right to an effective remedy must imperatively be preserved. Indeed, since the exceptions in their current state are ineffective, or at the very least uncertain<sup>94</sup>, and because insufficient transparency would not allow for the normal exercise of rights over cultural content, then the right to an effective remedy, a fundamental right<sup>95</sup>, would effectively be confiscated, because rightholders would find themselves unable to provide proof of any illicit use of their content<sup>96</sup>. The AIA is clear on this when it states that the transparency obligation has for objective "to help parties with legitimate interests, including copyright holders, to exercise and enforce the rights conferred on them by EU law"<sup>97</sup>. Recent announcements suggesting a one-year delay in the entry into force of the regulation further complicate the situation<sup>98</sup>.

In the absence of effective transparency, corrective measures should therefore be implemented to avoid ineffectiveness of the right to an effective remedy.

**Right to proof and property rights.** Beyond the clear infringement on the rightholder's procedural rights, the current situation also undermines their substantive right

---

<sup>93</sup> AIA, art. 56, 9.

<sup>94</sup> On the text and data mining exception and on the fair use exception, see *supra*, introduction, pt. 1.3.

<sup>95</sup> See notably art. 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms relating to the right to a fair trial, which states that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." and art. 47 of the Charter of Fundamental Rights of the European Union of December 18, 2000: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

<sup>96</sup> A. Bensamoun; "To be or not to be... transparent – For a matrix principle of transparency in the digital environment," *Dalloz Actualité*, Dec. 3, 2024, available online: <https://www.dalloz-actualite.fr/node/ito-be-or-not-be-transparente-pour-un-principe-matriciel-de-transparence-dans-l-environnement-n> : "Respect for a right in general (or proof of its infringement) in case of use of AI systems cannot be guaranteed without transparency at the risk of turning into a simple declaration of principle. The link between effectiveness and transparency is then essential. And more fundamentally, without transparency, it is the right to an effective remedy that is attacked."

<sup>97</sup> Recital 107.

<sup>98</sup> On this postponement, see notably I. Szczepanski, *AI Act: the Commission studies the possibility of a one-year delay in the application of the text*, May 28, 2025, available at the following link: <https://electronlibre.info/articles/100493-ia-act-the-commission-studies-the-possibility-of-a-one-year-delay-in-the-application-of-the-text/>

of property rights, which, once again, is enshrined in international texts<sup>99</sup>. Indeed, the rightholder cannot effectively protect their intangible property rights before a court if they are technically deprived of any means of proof: *idem est non esse aut non probari* (it is the same thing not to be and not to be proved).

The absence of transparency would therefore infringe upon two fundamental rights: the right to an effective remedy and the right to property, thus requiring reflection on alternative means of restoring the effectiveness of these rights. Beyond that, opacity appears as a barrier to building a relationship of trust among the actors of this emerging market.

## 2. Alternative solutions to transparency

**Scope of the task force.** As indicated in the mission letter, transparency is a “first tenet that will allow rightholders not only to verify that their objection to the use of their works and performances is taken into account, but also, and above all, to derive the economic consequences in terms of remuneration.” If the transparency established at the European level does not ensure this objective, other solutions should be evaluated. In this regard, the mission letter calls to “examine the possible legal mechanisms for each sector aimed at guaranteeing rightholders the effectiveness of their rights when works are used by AI providers.” Here lies the core challenge of the following proposals: **to restore effectiveness to the law.**

Moreover, it is an obligation for Member States which must, under Article 3 (1) of the IPR Enforcement Directive<sup>100</sup>, “provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive”.

In this context, it is not a question of “challenging” or “denouncing” but rather about building, by proposing levers for the emergence of a market.

**Proof and trade secrets.** Several solutions may be considered if the degree of transparency retained proves insufficient to effectively guarantee the right to an effective remedy. In any event, business secrecy should not be able to be invoked to practically neutralise the exercise of rights. The importance of the right to proof was recently recalled by the French Court of Cassation, which held that “the right to proof can justify the

---

<sup>99</sup> See notably art. 1 of the first additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties” and art. 17 of the Charter of Fundamental Rights of the European Union of December 18, 2000: 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected”.

<sup>100</sup> Dir. 2004/48/EC of the European Parliament and of the Council of April 29, 2004 on the enforcement of intellectual property rights.

production of elements covered by business secrecy, provided that this production is indispensable to its exercise and that the infringement is strictly proportionate to the pursued objective”<sup>101</sup>. The task force notes, in this regard, the paradox whereby some AI providers claim that the training is done on data not subject to literary and artistic property rights, while simultaneously invoking business secrecy to avoid disclosing the corpora used. If the difficulty lies not in knowing the corpus but in revealing it to the public, solutions are needed to overcome this blockage.

Several avenues can be envisaged to restore effectiveness to these otherwise paralysed fundamental rights, both in the pre-litigation phase (2.1.) and during litigation itself (2.2.).

## 2.1. In the pre-litigation phase

**Avoiding litigation.** The pre-litigation phase must not be neglected. On the contrary, this stage should be carefully examined; in some cases, how the situation unfolds may even allow the parties to avoid a long and costly trial. Thus, the task force reiterates its support for the path of dialogue (2.1.1.) as a useful prerequisite to any analysis of pre-litigation situations. It also proposes the creation of a facilitating authority, functioning as an AI mediator (2.1.2.), though without neglecting existing pre-litigation procedural tools (2.1.3.).

### 2.1.1. *The preliminary necessity of dialogue*

**Issues of upstream consultation.** Preliminary consultation would be useful for developing a kind of preliminary framework of the intrinsic issues related to structuring the cultural data market. At the Artificial Intelligence Action Summit, the Minister of Culture announced, in coordination with the Minister of AI, a consultation on an “ethical market respectful of copyright.” A space for dialogue, this consultation should “result in an equilibrium whereby creators are not sacrificed to technological interests”<sup>102</sup>.

While some actors representing the AI ecosystem consider the consultation premature and wish to await the conclusions regarding the template<sup>103</sup>, the political will to intervene early appears entirely appropriate. Such political support will notably help to partially reduce asymmetry

---

<sup>101</sup> Com., Feb. 5, 2025, no. 23-10.953.

<sup>102</sup> Remarks by the Minister of Culture, reported in the article “AI: France launches consultation on an ‘ethical market respectful of copyright’,” accessible via the following link: [https://www.francetvinfo.fr/culture/musique/ia-la-france-lance-une-concertation-sur-un-marche-ethique-respectueux-du-droit-d-auteur\\_7062923.html](https://www.francetvinfo.fr/culture/musique/ia-la-france-lance-une-concertation-sur-un-marche-ethique-respectueux-du-droit-d-auteur_7062923.html)

<sup>103</sup> Such as France Digitale. See notably the article accessible via the following link: [https://www.contexte.com/actualite/medias/pour-france-digitale-la-concertation-entre-la-tech-et-les-ayants-droit-est-prematuree\\_220448.html?go-back-to-briefitem=220448](https://www.contexte.com/actualite/medias/pour-france-digitale-la-concertation-entre-la-tech-et-les-ayants-droit-est-prematuree_220448.html?go-back-to-briefitem=220448)

which rightholders currently face, both in terms of information and of powers. It may also help establish the sought-after framework of trust.

More than anything, dialogue between parties is a decisive step towards creating the market. It should not be forgotten that many of them are already **accustomed to negotiation** which, with such political encouragement, could extend to the issue of AI.

The consultation was therefore launched on April 23, 2025<sup>104</sup>, led by two qualified and specially appointed individuals: Marc Bourreau, Professor of Economics at the Polytechnic Institute of Paris<sup>105</sup>, and Maxime Boutron, *Maître de requêtes* (Counsel) of the French *Conseil d'État* (Council of State).

**Charter.** Such a dialogue could help establish a general framework for future negotiations. This framework could, if appropriate, be recorded in a charter of good practices, setting out the major principles for the negotiation and exploitation of cultural data for an ethical market. Though such a charter would not have intrinsic legal force, this does not exclude its usefulness as a tool. Soft law has already demonstrated its advantages in the past, particularly in the fight against online counterfeiting<sup>106</sup>. Actors adhere to it, being aware of the ethical image it reflects of them.

This instrument could then set the broad orientations for future contracts, with parties committing to negotiate in good faith, demonstrating transparency, moderation, goodwill, etc. It could also integrate the recommendation of non-disclosure agreements (NDAs), so that AI providers can also protect their interests, especially regarding competition.

Ideally, the charter could lastly provide an indicative and non-binding framework facilitating contract drafting by suggesting avenues for setting prices, supply modalities, terms of use, etc.—without, of course, infringing on the contractual freedom of the parties.

Although it cannot be sufficient on its own, soft law seems a promising avenue to this task force. Ethics can at times precede regulation, at times extend it or facilitate its implementation. The proposed approach could usefully help soothe relationships and ultimately allow the establishment of a virtuous market.

### 2.1.2. The possibility of establishing an AI mediator

---

<sup>104</sup> The press release is accessible via the following links: <https://presse.economie.gouv.fr/lancement-dune-concertation-entre-les-developpeurs-de-modeles-dia-generative-et-les-ayants-droit-culturels/> and <https://www.culture.gouv.fr/fr/presse/communiqués-de-presse/lancement-d-une-concertation-entre-les-developpeurs-de-modeles-d-ia-generative-et-les-ayants-droit-culturels>

<sup>105</sup> Marc Bourreau was interviewed for this legal report prior to his appointment.

<sup>106</sup> See for example the charter on Good Practices for Online Advertising for the Respect of Copyright and Related Rights, signed at the Ministry of Culture in March 2015: <https://www.dailymotion.com/video/x2kdw7>

**From dialogue to mediation.** In the pre-litigation (or even non-contentious) phase, the path of dialogue had already been suggested by the task force on the implementation of the AIA<sup>107</sup>. Indeed, all parties have an interest in establishing rapid and non-contentious solutions.

In this context, there are procedures allowing for the organisation of information exchanges under satisfactory conditions, notably regarding the preservation of trade secrets, and which do not involve the courts. For this purpose, a direct exchange between the parties seems the most effective avenue, under the condition of concluding an NDA. The rightholder would thus be technically enabled by the provider to observe if their content has been used, but would be bound by confidentiality. Rightholders are accustomed to such confidentiality in negotiations, and no leak has ever been reported.

Beyond this, the need for a flexible yet lasting dialogue framework has been expressed by certain stakeholders. One option could be the creation of an AI mediator, modelled on the mediator for music<sup>108</sup>, the mediator for books<sup>109</sup>, or the mediator for cinema<sup>110</sup>. This mediator could then require the AI provider to produce a number of evidentiary elements, in order to determine whether the contested content has been used, as well as taking on a mission of conciliation, without prejudice to the parties' right to bring the matter before a judge.

**The AI mediator's scope of action.** The interest of having an AI mediator would be multiple. First, they could compensate for the weaknesses of "public" transparency by embodying a sort of trusted third party, to return to an already envisaged solution. Next, they would play the role of verifier, both in terms of the object and legitimacy of the rightholder's request—which would have to be appropriately motivated—and regarding the content of data used by the AI provider, without the latter being able to invoke trade secrets. Such a solution would also have the advantage of proportionality. If public disclosure<sup>111</sup> (and thus disclosure to competitors) constitutes the real problem for AI providers, the established confidentiality framework should remove this obstacle.

The creation of a mediator would thus produce a procedure for amicable investigation that preserves a restricted circle of confidentiality. The rightholder who has reason to believe that their content has been used would submit a request; it would then be a matter of verifying the reality of the situation. The mechanism would rely on a logic of spontaneous submission of evidence, similar to the American discovery procedure, except that the proposal would occur in the pre-litigation or even non-contentious phase<sup>112</sup>. A refusal of disclosure could be noted and used during litigation, notably at the stage of identifying presumptions<sup>113</sup>.

---

<sup>107</sup> Op. cit. report, p. 27.

<sup>108</sup> Art. L. 214-6 of the Intellectual Property Code.

<sup>109</sup> Decree no. 2014-936 of August 19, 2014 on the mediator for books.

<sup>110</sup> Art. L. 213-1 et seq. of the Code on Cinema and Moving Images.

<sup>111</sup> The template must be made "publicly available" under article 53 1 (d) of the AIA.

<sup>112</sup> On this procedure, see *infra*, Part 1, pt. 2.2.1.

<sup>113</sup> On the presumption, see *infra*, Part 1, pt. 2.1.2.

Given the technical nature of the task force, this mediator should be able to receive support from government departments, notably the PEReN (*Pôle d'Expertise de la Régulation Numérique*, Centre of Expertise for Digital Platform Regulation), or from authorities such as ARCOM.

To prevent any use as a delaying tool, the procedure should be subject to short deadlines, to be fixed by decree.

**Compatibility with EU law.** The non-binding nature of the procedure should ensure its compliance with Union law. It should also be emphasised that the AI mediator would not encroach on the domain of the market surveillance authority, whose powers are assigned to the AI Office under Article 88 of the AIA. As a matter of fact, the latter is responsible for verifying compliance with the AIA, whereas the mediator would operate as a procedural facilitator.

**Proposal.** Drawing inspiration from texts relating to the mediator for music and the mediator for books, the proposal could be formalised as follows:

*“I. The AI mediator is tasked with a mission of conciliation for any dispute relating to the use of content protected by copyright or related rights by an artificial intelligence provider. This intervention is without prejudice to the right of the parties to bring the matter before a judge.*

*May submit a matter to the AI mediator any holder of copyright or related rights, collective management organisation and representative of said holders, as well as professional or trade organisations demonstrating an acting interest, or the Minister of Culture.*

*The AI mediator may, within and for the needs of the exercise of their mission, conduct hearings as well as request from the parties any information deemed necessary. Trade secrets cannot be pleaded to the mediator. Confidential elements, documents, and information transmitted in this context cannot be made public. The parties are bound by confidentiality.*

*The AI mediator may refer matters to the Competition Authority if the facts revealed appear to constitute anti-competitive practices. The mediator may also consult this authority for an opinion. Conversely, the Competition Authority may request the mediator’s assistance on any matter within its competence and communicate any referral within the scope of the mediator’s mission.*

*The mediator has a period of three months from the receipt of the parties’ observations, or the expiry of the time allotted to produce them, to attempt to reconcile the parties.*

*In the case of an agreement between the parties, a record of conciliation is drawn up, specifying the measures to be implemented. It is signed by the parties and sets a deadline for its execution.*

*If no such agreement is reached within the allotted time, a statement of no settlement is established, either because there was a refusal to enter mediation or due to a lack of response to requests for information production. This record can be presented in court during litigation proceedings. The mediator may also issue a recommendation on measures that could resolve the dispute.*

*The mediator may make public their decision of conciliation, non-conciliation, or recommendation, subject to information protected by trade secrets.*

*II. The AI mediator's mission is to promote dialogue between the parties. In this regard, they may also make proposals to the Minister of Culture. They participate in and encourage the adoption of codes of practice between rightholders and AI providers.*

*The AI mediator sends an annual report on their activity to the Minister of Culture. This report is public. A copy is sent to the chairs of the permanent culture committees of the National Assembly and the Senate.*

*III. A decree by the Conseil d'État specifies the conditions of application of this article."*

### *2.1.3. Pre-litigation procedural tools*

**Duality of mechanisms.** There are, *de lege lata*, two procedural mechanisms that can be used to assist rightholders in demonstrating the use of content. One, derived from common law, is proper to the pre-litigation phase; the other, part of infringement litigation itself, is specific to literary and artistic property rights. Because they relate to different stages of litigation, their association may initially seem surprising. However, practitioners often consider them alternatively because of their strong similarities. For analytical purposes and with this distinction is clarified, a comparative study is appropriate.

**Common law: Article 145 of the Code of Civil Procedure (CPC).** Article 145 CPC<sup>114</sup>, at first glance, appears a useful avenue to restoring the right to an effective remedy. It establishes a procedure (by interim proceedings [*en référé*] or through an injunction on application without notice [*sur requête*]) which can be seen as a sort of “civil inquiry”; this procedure is not limited to the preservation of evidence but may also aim to establish it<sup>115</sup>.

Nevertheless, this mechanism can sometimes prove difficult to implement. Notably, the benefit of such measures lies in their surprise effect, preventing the other party from being informed beforehand and therefore having time to organise. The aim is thus to obtain authorisation via an injunction on application without notice. However, the Court of Cassation requires a demonstration as to why it is legitimate to derogate from the adversarial principle by opting for an injunction on application without notice, a demonstration that is

---

<sup>114</sup> Art. 145, CPC: “If there is a legitimate reason to preserve or establish before any trial the proof of facts on which the solution of a dispute could depend, the legally admissible investigative measures may be ordered at the request of any interested party, by an injunction on application without notice [*sur requête*] or through interim proceedings [*en référé*]”.

<sup>115</sup> In this regard, Civ. 2nd, June 17, 1998, no. 95-10.563. More recently, Soc. Dec. 19, 2012, nos. 10-20.526 and 10-20.528, Bull. civ. V, no. 341.



particularly difficult. For example, the judge considers that, where there exist exchanges of letters (formal notices) between the parties, it is no longer justified to opt for this measure, because the other party is already aware of the existence of a potential dispute<sup>116</sup>. The paradox lies in the fact that, at the same time, the Court of Cassation holds that the judge of interim proceedings must establish the existence of a potential dispute to order the measure<sup>117</sup>. In other words, it is necessary both to demonstrate the reality of the dispute and the absence of any element that would have allowed the other party to become aware of the impending litigation. Failing this, the element of surprise disappears and the mechanism is no longer justified. The boundary is very narrow, which probably makes the procedure much less effective.

Another drawback is related to “latency periods,” which can delay the procedure and discourage rightholders, especially when facing technology that develops very rapidly. In this respect, trade secrecy—although in principle not applicable to a measure *in futurum*<sup>118</sup>—remains a powerful argument, because it can block access to documents for a certain period. Indeed, after an injunction on application without notice, there follows a sorting procedure which results in a decision that can be appealed, etc. The conditions defining trade secrecy must be established<sup>119</sup> concerning each element that the party claims is covered for it to be invoked, with such procedural layers considerably slowing down access to evidence. While Article 145 of the Code of Civil Procedure can be implemented, its usefulness is therefore relative in an area where technical complexity risks compounding such difficulty.

**Literary and artistic property law.** The *saisie-contrefaçon* (seizure of infringing goods)<sup>120</sup>—which is proper to litigation proceedings rather than the pre-litigation phase—is also a relevant basis for restoring the possibility of obtaining proof. Once the specificity of the litigation framework has been clearly identified,

---

<sup>116</sup> See notably Civ. 2nd, Jan. 14, 2021, no. 19-25.206: “Having noted, subsequently, the general character of the motivation of the petition judge, and having observed that prior to its petition, Free Mobile company had sent to SFR company formal notices to block a certain number of disputed telephone terminals, to deduce that the latter was perfectly informed of the criticisms formulated by Free Mobile company against it and of its intention to seize justice in case of difficulty and was therefore able, if it wished, from the receipt of these formal notices to proceed with temporary blocking measures of the terminals they targeted, the court of appeal, which thus brought out that the necessity to proceed by surprise effect was not established, correctly deduced from all these observations, without incurring the grievances of the means, that it was not justified to derogate from the principle of contradiction and that there was reason, consequently, to retract the order of the president of the commercial court and to annul the record of acts drawn up by the bailiff.”

<sup>117</sup> Civ. 2nd, Nov. 16, 2017, no. 16-24.368.

<sup>118</sup> On this question, see notably Com. June 5, 2019, no. 17-22.192; Civ. 2nd, June 10, 2021, no. 20-11.987; Civ. 1st, Dec. 6, 2023, no. 22-19.285.

<sup>119</sup> These conditions are set by article 39.2 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of April 15, 1994, recently recalled by the Court of Cassation in the “Domino’s Pizza” case: Com., June 5, 2024, no. 23-10.954. The article states that “Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices<sup>10</sup> so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret”.

<sup>120</sup> Art. L. 332-1 et seq. CPI.

a comparison with Article 145 of the Code of Civil Procedure will prove useful.

On the basis of the *saisie-contrefaçon*, infringing goods can be seized or described, which is particularly useful in such cases. Moreover, since this procedure must take place on the grounds of an injunction on application without notice, there is no need to justify an exception to the adversarial principle. It thus offers the claimant the possibility of obtaining information through seizure, descriptive or otherwise, which helps to establish the scope of harm.

The problem with this special provision, however, stems from the fact that, especially in copyright law, it is necessary to demonstrate the originality of all the elements for which an infringement is claimed. In the case of use by AI providers, this can be particularly tedious (or, in some instances, impossible), given the very large quantity of absorbed content<sup>121</sup>.

**Differences and limits.** The two mechanisms—Article 145 of the Code of Civil Procedure and the *saisie-contrefaçon*—differ from the American discovery procedure<sup>122</sup> in that they intervene before any litigation proceedings; they also require prior judicial authorisations (and may generate disputes over authorisation and enforcement). Discovery, on the other hand, takes place during litigation and leaves a marginal role to the judge, since parties are supposed to spontaneously provide the elements. Other factors distinguish these two domestic law mechanisms: the timing of implementation is sometimes during litigation, sometimes in the pre-litigation stage; the appropriate judge may differ; the conditions and scope of investigation may vary, etc. And each has its own limits: the duration of the procedure; the difficulty in demonstrating both the existence of a dispute and the lack of notice to the other party; the challenge of proving the originality of the contents of which the unlawful use is alleged, and so on.

While these mechanisms can certainly be used now by rightholders, they insufficiently meet the requirement to preserve the right to an effective remedy. Thus, the option of an AI mediator remains highly pertinent.

## 2.2. In the litigation phase

**Facilitating evidence.** If the implementation of pre-litigation tools—either currently existing or proposed by the task force—does not lead to a solution, litigation may begin. In this context, the task force presents two proposals to restore the effectiveness of rights. One such proposal could be the establishment of a presumption of use of protected content (2.2.1.). New procedural mechanisms could also

---

<sup>121</sup> On the question of proof of originality, see “Proof of originality,” CSPLA report, pres. J.-A. Benazeraf and V. Barthez, Dec. 2020, accessible via the following link: <https://www.culture.gouv.fr/fr/nous-connaître/organisation-du-ministère/Conseil-supérieur-de-la-propriété-littéraire-et-artistique-CSPLA/travaux-et-publications-du-cspla/missions-du-cspla/Mission-du-CSPLA-sur-la-preuve-de-l-originalité>.

<sup>122</sup> On which see *infra*, Part 1, pt. 2.2.2.

usefully facilitate the provision of evidence (2.2.2). This raises the question of the proper venue for the establishment of such mechanisms (2.2.3).

### *2.2.1. The presumption of use path*

**Presentation of the presumption (initial phase).** As has already been publicly debated, some rightholders support a mechanism based on a presumption of use or exploitation. Initially, this would involve presuming—subject to proof to the contrary—that the cultural content has been used by an AI system based on the generated result, because the latter bears similarities with one or more content(s) protected by literary and artistic property rights. The evidentiary mechanism would thus overcome the practical difficulty faced by rightholders in demonstrating use.

**Compliance with European Union law.** EU law does not seem to oppose such autonomous recognition by a Member State if this path were chosen. The principle of procedural autonomy, originating from case law<sup>123</sup>, holds that in the absence of EU legislation, it is up to the internal legal order of each Member State to designate competent courts and regulate procedural modalities of legal remedies aimed at safeguarding rights that individuals derive from direct effect<sup>124</sup>.

It is well established that this principle of procedural autonomy extends to evidentiary matters<sup>125</sup>.

An analogy-based reflection is possible here to determine the scope of discretion left to Member States. Thus, in the field of liability for defective products<sup>126</sup> applied to vaccines, the Court of Justice<sup>127</sup> has validated the creation of an evidentiary mechanism allowing the national judge “to conclude that [the existence of the product defect and the causal link between the defect and the damage suffered] has been proven to exist, on the basis of a set of evidence the seriousness, specificity and consistency of which allows it to consider, with a sufficiently high degree of probability, that such a conclusion corresponds to the reality of the situation”<sup>128</sup>. The Court further states that “such evidentiary rules do not bring about a reversal of the burden of proof which, as provided for in Article 4 of Directive 85/374, it is for the victim to discharge, since that system places the burden on the victim to prove the various elements of his case which, where applicable, taken together will provide the court hearing the case with a basis for its conclusion

---

<sup>123</sup> ECJ, Dec. 16, 1976, “Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland,” case 33-76, ECLI:EU:C:1976:188 and “Comet BV v. Produktschap voor Siergewassen,” case 45-76, ECLI:EU:C:1976:191.

<sup>124</sup> Ibid., respectively pt. 5 of the “Rewe” judgment and pt. 13 of the “Comet” judgment.

<sup>125</sup> CJEU, June 21, 2017, C-621/15, “Cts WW v. Sanofi-Pasteur”.

<sup>126</sup> Dir. 85/374/EEC of the Council of July 25, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

<sup>127</sup> CJEU, June 21, 2017, “Cts WW v. Sanofi-Pasteur,” op. cit.

<sup>128</sup> Ibid., pt. 28.

as to the existence of a defect in the vaccine and a causal link between that defect and the damage suffered.”

The Court subjects the validity of the mechanism to two cumulative conditions in this case: on the one hand, the evidence produced must be sufficiently serious, precise, and substantive<sup>129</sup>; on the other hand, the principle that the burden of proof rests with the victim prove must remain intact, so that the judge must retain their free assessment as to whether such proof has been provided to a sufficient legal standard<sup>130</sup>.

Under these conditions, the creation of a simple presumption, which would apply in a field not harmonised by EU law and the triggering criteria of which would be qualified indicators justifying a reversal of the burden of proof, would be conceivable and covered by the principle of procedural autonomy, provided the judge retains discretion regarding the completeness of these criteria.

Moreover, the European judge’s refusal to recognise the effectiveness of a simple presumption of public communication of works regarding a sound system<sup>131</sup> appears without consequence here. Indeed, the Court of Justice had considered that EU law opposed the creation by national law of a simple presumption of public communication of musical works based on the presence of sound systems in means of transport. However, this refusal was justified by the fact that the act in question was precisely not an act of communication to the public within the meaning of EU law; any presumption in this sense was held to be ineffective<sup>132</sup>. This is not the case regarding the presumption proposed here, since it is incontestable that the use made of the contents does implement a monopoly—specifically the right of reproduction—as noted by the AIA itself<sup>133</sup>.

---

<sup>129</sup> Ibid., pt. 37: “Therefore, national courts must first ensure that the evidence adduced is sufficiently serious, specific and consistent to warrant the conclusion that, notwithstanding the evidence produced and the arguments put forward by the producer, a defect in the product appears to be the most plausible explanation for the occurrence of the damage, with the result that the defect and the causal link may reasonably be considered to be established.” – Comp. art. 1382 C. civ. on the qualification of evidence when the mechanism is judicial.

<sup>130</sup> Ibid., pt. 38: “Secondly, those same courts must ensure that the principle that it is for the victim to prove, through all means of proof generally allowed under national law and, as in the present case, inter alia through the production of serious, specific and consistent evidence, that there is a defect in the vaccine and a causal link, remains intact. This requires the court to safeguard its own freedom of assessment in determining whether such proof has been made out to the requisite legal standard, until such time as, having examined all the evidence adduced by both parties and the arguments exchanged by them, it considers itself in a position to draw a definitive conclusion on the matter, having regard to all the relevant circumstances of the case before it (see, by analogy, judgment of 9 November 1983, *San Giorgio*, 199/82, EU:C:1983:318, paragraph 14).”

<sup>131</sup> CJEU, 20 Apr. 2023, joined cases C-775/21 and C-826/21, “Blue Air Aviation”.

<sup>132</sup> Ibid., para. 67.

<sup>133</sup> AIA, recital 105, on which see already *supra*, introduction: “General-purpose AI models, in particular large generative AI models, capable of generating text, images, and other content, present unique innovation opportunities but also challenges to artists, authors, and other creators and the way their creative content is created, distributed, used and consumed. The development and training of such models require access to vast amounts of text, images, videos, and other data. Text and data mining techniques may be used extensively in this context for the retrieval and analysis of such content, which may be protected by copyright and related rights. Any use of copyright protected content requires the authorisation of the rightsholder concerned unless relevant copyright exceptions and limitations apply. Directive (EU) 2019/790 introduced exceptions and limitations allowing reproductions and extractions of works or other subject matter, for the purpose of text and data mining, under certain conditions. Under these rules, rightsholders may choose to reserve their rights over their works or other subject matter to prevent text and data mining, unless this is done for the purposes of scientific research. Where the rights to opt out has been expressly reserved in an appropriate manner, providers of general-purpose AI models

Finally, the principle of equivalency<sup>134</sup>, which could constitute an additional barrier to the establishment of a presumption, does not seem to be in question, whereas the principle of effectiveness<sup>135</sup> could well reinforce the legitimacy of this last<sup>136</sup>.

**Presumptions in intellectual property law.** The approach of a presumption may appear all the more appropriate since this type of evidentiary facilitation granted to rightholders is well known in intellectual property law. For example, there exists a case-law presumption of ownership in favour of legal entities using works who take action for infringement<sup>137</sup>.

Even more significantly, in civil proceedings, the judge may go so far as to consider good faith irrelevant<sup>138</sup>, thereby preventing the defendant from defending themselves by invoking it. This last

---

need to obtain an authorisation from rightsholders if they want to carry out text and data mining over such works". (Our emphasis.)

<sup>134</sup> The principle of equivalency, of judicial origin, implies that in "the absence of community rules on this subject, it is for the domestic legal system of each member state to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature" (ECJ, 16 Dec. 1976, "Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland", op. cit.).

<sup>135</sup> The principle of effectiveness means that if a right is recognised for an individual by European Union law, Member States have the responsibility to ensure its effective protection, which implies the existence of judicial remedy.

<sup>136</sup> Linking these principles of equivalency and effectiveness, CJEU, 21 June 2017, op. cit., para. 25: "under the principle of procedural autonomy and subject to the principles of equivalency and effectiveness, it is for the national legal order of each Member State to establish the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it and also the level of proof required (see, by analogy, judgments of 15 October 2015, Nike European Operations Netherlands, C-310/14, EU:C:2015:690, paragraphs 27 and 28, and of 21 January 2016, Eturas and Others, C-74/14, EU:C:2016:42, paragraphs 30 and 32)". (Our emphasis).

<sup>137</sup> The presumption was enshrined by Civ. 1st, 24 March 1993, "Aréo [2nd judgment]", No. 91-16.543: RTD com. 1995, p. 418, obs. Françon; JCP 1993. II. 22085, note Greffe; RIDA Oct. 1993. 191, obs. Kéréver. The judgment stated "that in the absence of any claim by the natural person or persons who made the photographs, these acts of possession were such as to give rise to a presumption, vis-à-vis third-party infringers, that the [operating] company was the holder of the incorporeal property rights of the author over these works, whatever their qualification".

<sup>138</sup> See notably Civ. 1st, 29 May 2001: Bull. civ., I, No. 154; D. 2001, p. 1952; Prop. intell. 2001, No. 1, p. 71, obs. P. Sirinelli; Comm. com. électr. 2002, comm. 84, note C. Caron: "infringement is characterised, independently of any fault or bad faith, by the reproduction, representation or exploitation of a work of the mind in violation of the property rights attached thereto". In the same sense, Civ. 1st, 13 Nov. 2008: Bull. civ., I, No. 258: "infringement is characterised independently of any fault or bad faith". Comp. Civ. 1st, 3 Dec. 2002, No. 00-20.332, Bull. civ. I, No. 292; Prop. intell. 2003, No. 6, p. 45, obs. P. Sirinelli: "in its relations with the holder of the disregarded rights, the good or bad faith of the infringer is irrelevant".

hypothesis then goes beyond the simple presumption of bad faith before the criminal judge<sup>139</sup>, as it is irrebuttable.

The presumption mechanism is thus familiar from this field, and is often used to protect the interests of rightholders.

**In addition: proof by judicial presumption.** Beyond the cases known from case law, and in accordance with article 1382 of the Civil Code, “presumptions that are not established by law are left to the judge’s discretion, who must only admit them if they are serious, precise, and substantive, and only in cases where the law allows proof by any means.” Under current law, the judge could also decide that the indicators presented during litigation allow the presumption of unauthorised use of cultural content by an AI system. It would then be up to the person claiming to be a victim to provide sufficient evidence for such a judicial presumption to be applied.

**Comparison: a proposed American bill.** A proposed American bill called “PADRA” (Preventing Abuse of Digital Replicas Act)<sup>140</sup> takes a similar tack. Admittedly, it is focused on the digital replication of a person’s characteristics (voice, appearance, etc.). However, an analogy remains pertinent, especially since the proposal also embraces the hypothesis of AI reusing “a characteristic of the creative works of the subject person, that is distinctive to the subject person such that the use of such characteristic is likely to be associated with the subject person,<sup>141</sup>” which may notably relate to performances covered by related rights of performing artists. Moreover, this proposal provides that “in a civil action brought [...] for the use of a digital replica by a person on or in connection with any goods or services, or any container for goods there shall be a rebuttable presumption that such use is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person”<sup>142</sup>.

---

<sup>139</sup> On the simple presumption of bad faith before the criminal judge, see already *Crim.*, 11 Apr. 1889 and 13 March 1890: *Ann. prop. ind.* 1892, p. 189 and 190. Especially *Crim.*, 1 Feb. 1912, in which the Court of Cassation explicitly establishes the principle: “if the offence of infringement of an artistic work is subject like other offences to the double condition of the existence of a material fact and the guilty intention of its author, the good faith of the accused is not presumed; it is for him to provide proof thereof”: *Gaz. Pal.* 1912, 1, p. 437; *Crim.*, 28 Feb. 1956: *JCP G* 1956, II, 9520. For an application of the presumption in the context of an infringement of related rights, see *Crim.*, 13 Dec. 1995, “Mlle Chante le blues”, No. 93-85.256, *Bull. crim.* No. 378; *RIDA* 1996, No. 169, p. 279.

<sup>140</sup> The proposal, on which see already *supra*, introduction, pt. 1.2, was submitted in December 2024 before the House of Representatives and accessible via the following link: <https://issa.house.gov/sites/evo-subsites/issa.house.gov/files/evo-media-document/PADRA%20Final.pdf>

<sup>141</sup> *Ibid.* The full text states: “the term ‘digital replica’ means computer generated representation of an identifying characteristic of a subject person, who at the time of the use of the representation is a living individual human being, where — (i) the identifying characteristic is an image, voice, likeness, or other characteristic of the subject person, or a characteristic of the creative works of the subject person, that is distinctive to the subject person such that the use of such characteristic is likely to be associated with the subject person and no other person by reasonable and ordinary participants in the relevant industry or market”.

<sup>142</sup> *Ibid.*

If the proposal is intended to amend trademark law—not copyright law—its existence nonetheless supports the interest in relying on presumptive mechanisms in the field of AI.

**Evaluating the presumption.** The presumption of use appears sustainable, provided it is based on indicators and, like all presumptions, rests on *plerumque fit* (what typically occurs). This latter point poses no particular difficulty: it is now well documented that cultural content has been used in very large quantities by AI providers, notably through training datasets freely available without any authorisation.

Such a mechanism must, however, be carefully assessed.

First, the precondition of this facilitation would be that the mechanism is limited to an exclusively evidentiary function, which would in no way predetermine the remuneration models to be adopted. The presumption should therefore in no case be linked to any particular remuneration model (notably a statutory licence or a compensatory exception). In other words, it should constitute a mere evidentiary convenience and not a legal fiction leading to the implementation of a predetermined mode of remuneration, as exists in the case of private copying. The evidentiary facilitation represented by the presumption must not be diverted from its purpose; failing this, compliance with Union law would be doubtful.

Next, the criterion of resemblance, which is present in the public debate, could be included within a broader set of indicators, insofar as it is more or less relevant depending on the sector. Moreover, the generated content may only have borrowed the style or artistic movement. Thus, either the required degree of resemblance is low, and there is a risk that the presumption becomes systematic (since there would no longer really be any implementation condition), which would likely be contrary to the Court of Justice’s requirements regarding the judge’s freedom of assessment; or the required degree is high, and it would almost amount to labelling the act counterfeiting, so that the usefulness of the mechanism would be residual. Further, the more content the AI has been fed with, the more the unique “footprint” of each tends to fade—or at least to blend—into the produced result. The presumption could then have a perverse effect, encouraging the use of a larger quantity of content so that resemblances become less obvious to detect. Filters may also limit the level of resemblance. Lastly, resemblance could be ineffective in the field of related rights concerning multiple interpretations of the same work.

The aim is not to exclude the criterion of resemblance, but to qualify it by attaching other, alternative criteria. It may sometimes appear pertinent. The issue is not to identify the output as necessarily infringing copyright of the concerned cultural content but to demonstrate, through the existence of similarities—even those insufficient to characterise counterfeiting in the output—that it is plausible that the content was reproduced by the AI for the purposes of content generation.

It is this initial act of reproduction, undertaken without authorisation, that constitutes infringement.

It is therefore necessary to open the presumption to other triggering criteria that make the use of the protected content probable.

**Purpose and justification of the proposal.** The goal of this reflection is, in the absence of sufficient transparency, to restore rights to rightholders. Such a mechanism could have a dual effect. The most obvious, at the litigation stage, would involve its implementation and thus a reversal of the burden of proof. But the presumption could also have implicit effects upstream, in the pre-litigation or non-contentious phase. Knowing that the burden of proving the absence of use will rest on them, the AI provider might be more receptive to considering a solution before litigation arises, through licensing agreements. The incentivising effect of the legal rule must not be overlooked.

Regarding the proposed text, four clarifications are important. First, considering that the protected content is presumed to have been “used” and not “reproduced” seems appropriate for two related reasons. On the one hand, use implies upstream reproduction. Recital 105 of the AIA<sup>143</sup> explicitly links the two notions. On the other hand, the extremely rapid evolution of technology calls for caution here. While it is quite obvious today that the use in question involves reproduction, this might not be the case tomorrow. Therefore, since the term “use” easily refers to the exercise of the monopoly concerning the reproduction right, it seems wiser to opt for this more neutral and flexible term, which could eventually include other acts of exploitation. Ultimately, the term is deployed here as a synonym for exploitation adopting the vocabulary of the AIA.

Second, this use takes place at one or more stages of the system’s data supply chain, whether the supply is direct or mediated.

Moreover, the requirement of “serious” indicators seems sufficient for the presumption to comply with the requirements of European Union law. This expression has the additional advantage of already being known in laws from other branches of French law<sup>144</sup>.

Finally, the task force considers it judicious, at least at this stage of reflection, not to limit itself to stating a presumption but to support it with a list of indicators. This list does not seem to present any particular drawback, provided that its illustrative nature does not limit the judge, who remains free to add to it as uses and technologies evolve. On the contrary, given that this is a relatively new issue in courts, such a non-exhaustive list has the advantage of providing the judge with guidance, thus facilitating the identification of relevant indicators when necessary.

**Proposal.** The presumption could be formulated as follows:

---

<sup>143</sup> On which see already *supra*.

<sup>144</sup> See for example articles 171-4 and 175-2 of the Civil Code regarding marriage annulment.



*“The object protected by copyright or related rights is presumed, unless proven otherwise, to have been used to generate one or more contents by the AI system, provided that there are serious indications supporting such use.*

*The following may notably be considered as indicators allowing the presumption of use:*

- 1. The crawling of indexing robots on protected content as referred to in the first paragraph of this article;*
- 2. The observation of the presence of protected content of the same kind in public databases used for training or specialising models;*
- 3. The existence of similarities between the protected object and the generated content;*
- 4. The mention of a credit, even if erroneous, to a rightholder in the generated content;*
- 5. Confessions made in third-party proceedings or public statements acknowledging the use of protected content or datasets containing protected content;*
- 6. The ability to generate content “in the style” of a protected object or a rightholder;*
- 7. The refusal by the defendant to disclose evidence before the AI mediator.”*

**Value of the presumption.** Such a formulation would preserve the rights (both procedural and substantive) of the rightholder, while allowing the AI provider the possibility to prove otherwise. The illustrative list of criteria likely to trigger the presumption also seems to provide sufficient guarantees to ensure the robustness of the mechanism. And, since serious indications exist regarding the reality of the use, the reversal of the burden of proof would thus be justified.

The principle that the burden of proof rests on the victim is preserved, as it will be the responsibility of the rightholder to characterise the triggering criteria (through extrajudicial confessions or in other procedures sometimes carried out by AI providers themselves, studies relating to training methods, expert assessments of similarities, etc.). Furthermore, case law could then develop criteria specific to each sector or even adopt specific and sectoral interpretations of the criteria. For example, in the field of the press, the assessment of similarities could stem from highlighting an abnormal recurrence of terms, expressions, or structures specific to certain media outlets.

The presumption would also have the interest—as in Article 17 of the 2019 Directive<sup>145</sup>—of encouraging negotiation by restoring the enforceability of rights, at least on the evidentiary level.

**Identifying the limits of the presumption.** It could be argued here that the contrary proof expected from the AI provider amounts to proving a negative fact as, in order to reverse the presumption, the provider must prove that they did not use the content. However, providing the list of contents used will allow, by negative inference, the establishment of

---

<sup>145</sup> On this article, and the negotiating leverage it represents, see *supra*, introduction, pt. 3.

a response. It should be recalled that judicial proceedings can, if necessary, create conditions of confidentiality, so that this list cannot be disclosed.

Another identified limitation is quantitative: could each isolated rightholder invoke the benefit of the presumption? Here, there is a risk of “court congestion.” However, it is unlikely that isolated rightholders would take action given the costs involved in litigation.

**Proposal for a class action.** One solution could be to provide for a joint action by several rightholders. For comparison, the General Data Protection Regulation<sup>146</sup> (GDPR) provides in its Article 80 the possibility to opt for a class action<sup>147</sup>. Article 37 of the French Data Protection Act (“*Loi Informatique et Libertés*”)<sup>148</sup> offers a limited list of entities entitled to bring such a suit<sup>149</sup>. It would therefore be possible to take inspiration from the mechanism recognised in the GDPR to establish this type of suit for the benefit of rightholders, in order to encourage—if not compel—collective action<sup>150</sup>.

Taking inspiration from the aforementioned article of the Data Protection Act, the provision could be drafted as follows:

*“I. When several natural or legal persons, placed in a similar situation, suffer harm having as common cause an infringement of the same nature to their copyright or related rights by an artificial intelligence provider, a class action may be brought before the competent civil court in view of the individual cases presented by the claimant.*

*II. This court action may be exercised to put an end to the infringement mentioned in I, or to hold liable the person who caused the harm in order to obtain compensation for the harm suffered.*

*III. The following may bring such court action:*

<sup>146</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>147</sup> Ibid., art. 80: “1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law. 2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject’s mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing”.

<sup>148</sup> Law No. 78-17 of 6 January 1978 on data processing, data files and civil liberties.

<sup>149</sup> Ibid., art. 37, IV: “IV.- Only the following may exercise this action: 1° Organisations regularly declared for at least five years having the protection of privacy or the protection of personal data in their statutory purpose; 2° Consumer protection organisations representative at national level and approved under article L. 811-1 of the consumer code, when the processing of personal data affects consumers; 3° Trade union organisations of employees or civil servants representative within the meaning of articles L. 2122-1, L. 2122-5 or L. 2122-9 of the labour code or of III of article 8 bis of law no. 83-634 of 13 July 1983 on the rights and obligations of civil servants or representative unions of magistrates of the judicial order, when the processing affects the interests of persons whom the statutes of these organisations charge them to defend.”

<sup>150</sup> The DDADUE 2025 law (No. 2025-391 of 30 April 2025) establishes a unified regulation for class actions in all areas (except public health), which could encompass the hypothesis considered here (see art. 16).

*1° Collective management organisations;*

*2° Trade unions or professional organisations representing rightholders;*

*3° Rights protection associations.”*

In any case, the existence of this class action would not prevent an individual rightholder or their representative from taking action. Especially since some suits, notably those concerning a catalogue or brought by a collective management organisation, are by nature “collective.”

### *2.2.2. Other procedural avenues*

**Sources of inspiration.** Other avenues could be considered to reinforce the procedural safeguards offered to rightholders to protect their right to evidence in litigation. These avenues, drawn for comparison from U. S. law or EU law—sometimes from proposals that were ultimately abandoned—usefully enrich the discussion.

**United States law.** It is useful to draw inspiration from the discovery procedure established under United States law. On the basis of this procedure, during the search for evidence to be used in litigation, a party can be compelled to provide any information (acts, documents, etc.) relevant to resolving the dispute, even should that information be unfavourable to the party producing it and regardless of its location, form, or content.

Refusal by the concerned party can have serious consequences for them, such as monetary sanctions, impacts on the outcome of the case (since alleged facts may be considered established in case of refusal), etc.

The procedure has a further, undeniable advantage: a foreign court can request discovery from the United States<sup>151</sup>, which can be very useful when the AI provider is based in that territory.

---

<sup>151</sup> 28 U.S. Code § 1782: Assistance to foreign and international tribunals and to litigants before such tribunals (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Transposing the discovery procedure to France could, however, prove complex insofar as providers would likely invoke trade secrecy, since court decisions are public. Yet here too, it would be possible to establish a confidentiality framework in such types of litigation. For instance, only appointed experts, bound by strict confidentiality rules, could access the documents, and court decisions could be redacted to remove any content infringing on trade secrets.

**European law.** Discussions on setting up mechanisms to facilitate the provision of proof due to the technical nature of evidence have also taken place at the European level.

A first attempt was aborted. The proposed Artificial Intelligence Liability Directive<sup>152</sup> included a mechanism allowing national courts to request the disclosure of pertinent evidence concerning an AI system, provided that the potential claimant presented sufficient facts or evidence to support the plausibility of a compensation claim<sup>153</sup>. The issue of trade secrets was accounted for, as the provision stipulated that “national courts should be empowered, at the duly justified request of a party or on their own initiative, to take specific measures necessary to preserve confidentiality when such evidence is used or referred to during judicial proceedings”<sup>154</sup>. Lastly, the draft also considered the consequences of a refusal from the defendant. Such a refusal would give rise to a rebuttable presumption of non-compliance with the duty of care<sup>155</sup>. Due to the complexity of the geopolitical context, however, the proposal was quietly dropped by the Commission in February 2025, as part of its 2025 work programme<sup>156</sup>.

A second initiative was carried through, and its implementation into national law is now pending via transposition. The Product Liability Directive of 23 October<sup>157</sup> specifically aims to update the current liability regime in light of emerging technologies such as artificial intelligence. Article 9 of this directive thus provides that, where the compensation claim appears plausible and well-founded,

---

<sup>152</sup> Proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), 28 Sept. 2022.

<sup>153</sup> Ibid., art. 3.1

<sup>154</sup> Ibid., art. 3.4, para. 3.

<sup>155</sup> Ibid., art. 3.5.

<sup>156</sup> [https://commission.europa.eu/document/download/7617998c-86e6-4a74-b33c-249e8a7938cd\\_en?filename=COM\\_2025\\_45\\_1\\_annexes\\_EN.pdf&ref=thetack.technology](https://commission.europa.eu/document/download/7617998c-86e6-4a74-b33c-249e8a7938cd_en?filename=COM_2025_45_1_annexes_EN.pdf&ref=thetack.technology)

<sup>157</sup> Dir. 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.

the defendant may be compelled to disclose evidence that could work against them<sup>158</sup>. The upcoming transposition of the directive will thus offer the French legislator an opportunity to strengthen evidentiary tools in this specific field, which could also serve as a source of inspiration regarding the use of cultural content by AI systems.

This procedure for ordering the disclosure of evidence would align with Article 144 of the French Code of Civil Procedure<sup>159</sup>. Article 788 of the Code of Civil Procedure<sup>160</sup> could serve as the legal basis for a regulatory development: by virtue of this provision that applies during litigation, a pre-trial judge can investigate and compel the production of documents. Further clarifications could be introduced during transposition to incorporate this new procedure into positive law.

**Evidence, disclosure, and presumption.** These European provisions—whether enacted or abandoned—demonstrate the legislator’s growing awareness of the burden of proof in certain complex environments. In this regard, the fact that the now-abandoned proposal for an AI Liability Directive had established a presumption of non-compliance with an obligation in the event of non-disclosure of evidence is extremely helpful. A similar line of reasoning could therefore be proposed to establish a specific procedural rule concerning the use of cultural content.

---

<sup>158</sup> Ibid., art. 9: “1. Member States shall ensure that, at the request of a person who is claiming compensation in proceedings before a national court for damage caused by a defective product (the ‘claimant’) and who has presented facts and evidence sufficient to support the plausibility of the claim for compensation, the defendant is required to disclose relevant evidence that is at the defendant’s disposal, subject to the conditions set out in this Article. 2. Member States shall ensure that, at the request of a defendant that has presented facts and evidence sufficient to demonstrate the defendant’s need for evidence for the purposes of countering a claim for compensation, the claimant is required, in accordance with national law, to disclose relevant evidence that is at the claimant’s disposal. 3. Member States shall ensure that the disclosure of evidence pursuant to paragraphs 1 and 2, and in accordance with national law, is limited to what is necessary and proportionate. 4. Member States shall ensure that, when determining whether the disclosure of evidence requested by a party is necessary and proportionate, national courts consider the legitimate interests of all parties concerned, including third parties, in particular in relation to the protection of confidential information and trade secrets. 5. Member States shall ensure that, where a defendant is required to disclose information that is a trade secret or an alleged trade secret, national courts are empowered, upon a duly reasoned request of a party or on their own initiative, to take the specific measures necessary to preserve the confidentiality of that information when it is used or referred to in the course of or after the legal proceedings. 6. Member States shall ensure that, where a party is required to disclose evidence, national courts are empowered, upon a duly reasoned request of the opposing party or where the national court concerned deems it appropriate and in accordance with national law, to require such evidence to be presented in an easily accessible and easily understandable manner, if such presentation is deemed proportionate by the national court in terms of costs and effort for the required party. 7. This Article does not affect national rules relating to the pre-trial disclosure of evidence, where such rules exist”.

<sup>159</sup> Art. 144 CPC: “Investigative measures may be ordered at any stage of proceedings, provided that the judge does not have sufficient elements to rule.”

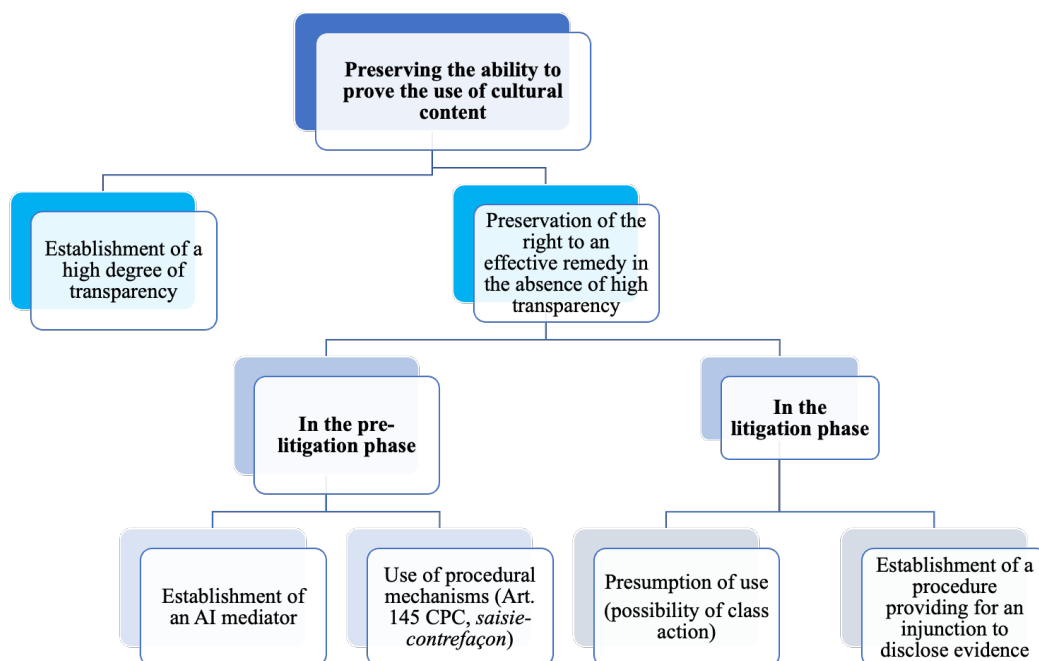
<sup>160</sup> Art. 788 CPC: “The pre-trial judge exercises all powers necessary for the communication, obtaining and production of documents.”

**Proposition.** Given the technical nature of this evidence, it may be useful to establish a procedure for the compelled disclosure of such evidence, inspired by the aforementioned European texts:

*“If the claimant—being a holder of copyright or related rights, a collective management organisation or their representative, or a professional or trade union organisation demonstrating a legitimate interest—presents facts or evidence making it plausible that an AI provider has used their content protected by copyright or related rights without authorisation, the judge shall be empowered to request from said provider, or from any person likely to have supplied them with such content, the disclosure of relevant evidence in support of the claim.*

*Such disclosure shall be limited to what is necessary and proportionate to substantiate the action. If the defendant invokes trade secrecy in a duly reasoned manner, the judge shall take appropriate measures to preserve the confidentiality of the disclosed information.*

*The judge shall draw appropriate conclusions from the defendant’s failure to respond.”*



*Chart summarising the solutions for preserving the right to an effective remedy*

These various proposals each have their utility. It will be up to the political authorities to evaluate their relevance, be that alternative or cumulative.

### *2.2.3. The site of the formalisation of mechanisms*

**Feasibility of national reform.** The technical feasibility of a national reform seems clear, so long as no conflict with European Union law is identified. In this case, the principle of procedural autonomy appears to leave sufficient room for manoeuvre for States to establish this type of mechanism, particularly presumptive ones, provided that these can be overturned by evidence to the contrary.

In this framework, all the mechanisms proposed by the task force aim to restore the right to an effective remedy under satisfactory conditions, particularly by preserving trade secrets.

**Value of European reform.** The task force, however—aware of the strength acquired by a coordinated solution at the European level—advances the possibility of a European reform, offering full effectiveness to the mechanism in a technological environment where rules must have a broad territorial effect. The question then remains to identify an appropriate legislative vehicle. Such an objective was moreover recently highlighted by the Council of Ministers of Culture of the European Union<sup>161</sup>.

Because harm will not be solely linked to violations of literary and artistic property rights, and because the difficulties of proof will therefore be shared, the AI Liability Directive<sup>162</sup> proposal would undoubtedly have been the most suitable venue, particularly for the presumption of use as well as for the injunction to disclose evidence. It has, however, been withdrawn from the Commission's agenda<sup>163</sup>, though some European parliamentarians still defend the idea of putting such a text back on the agenda. The regulation proposed by the AIA is a completely different subject from that of repairing harm, which occurs downstream from the realization of harm.

Failing this, a reform of the IPR Enforcement Directive<sup>164</sup> could be considered. Indeed, this text emerges as the most suitable normative corpus in special law, insofar as the identified difficulty

---

<sup>161</sup> Press release, “The value of culture and creative sectors in AI development: preserving copyright and related rights and ensuring transparency within the framework of the AI Act,” op. cit. The press release thus states that “It is essential to ensure a concerted and coherent approach among Member States to monitor the application of the code, which will make it possible to draw lessons and acquire knowledge that, in the future, will help establish solid principles ensuring greater effectiveness in protecting copyright and creative rights, ensuring that the European Union adopts a clear and strong position towards global operators, promoting a fair and sustainable competitive environment.”

<sup>162</sup> Proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), 28 Sept. 2022.

<sup>163</sup> Commission work program 2025, “Moving forward together: a bolder, simpler, faster Union,” COM(2025) 45 final, 11 Feb. 2025.

<sup>164</sup> Dir. 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

does not concern a problem of substantive law—even if the inability to prove the use at hand is equivalent to the impossibility of exercising the relevant right—but rather relates more to an evidentiary question.

Such a suggestion appears all the more pertinent as it concerns a text that is now more than twenty years old, which undoubtedly merits an update. It may certainly be objected here that it is difficult to imagine the reopening of this directive, insofar as it involves individual freedoms, the balancing of which with the protection of rights is never easy and involves difficult, intricate work.

Nevertheless, a revision of the 2004 directive, in view of new challenges in the defence of literary and artistic property rights, would appear appropriate, especially if it came to formalise one of the evidentiary tools already envisaged by the European legislator in other sources and in connection with technological opacity.

Recital 20 of the text provides an argument to this effect, stating in particular that “given that evidence is a crucial element for establishing infringement of intellectual property rights, it is necessary to ensure that the means of presenting, obtaining and preserving evidence actually exists.”

**From the necessity to the possibility of a market.** The various mechanisms allowing the safeguarding of the right to an effective remedy—particularly the AI mediator, the presumption of use, class action, and the injunction to disclose evidence—could thus prove useful, and constitute an additional lever towards the creation of a market. The emergence of this market presupposes the establishment of an equal negotiating framework.



## **PART 2. THE POSSIBILITY OF A MARKET**

**The establishment of a balanced framework of trust.** The conditions are in place to accompany the emergence of a market. However, this can only arise if all parties find an interest in it; the establishment of a mutual framework of trust is decisive here.

This assertion is even more essential when discussing counterparts to the use of cultural content, the real crux here. In essence, cultural data is not freely given; it has value, and therefore a price.

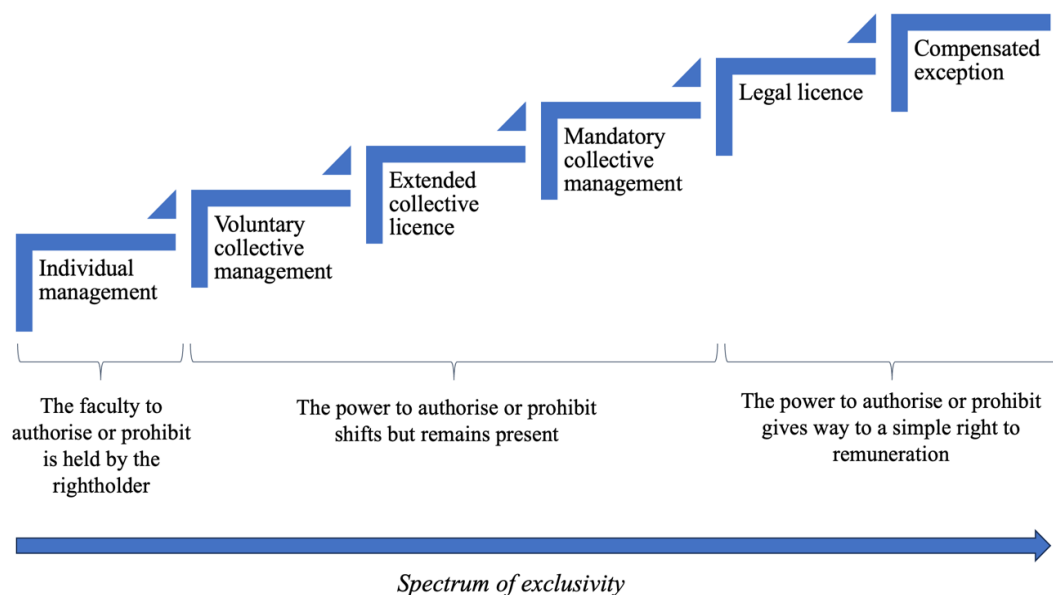
The remuneration model remains to be determined. However, an exhaustive analysis of the field of possibilities (1.) leads the task force to formulate a balanced proposition, without one interest being sacrificed to the benefit of another (2.).

### **1. The field of possibilities**

**General framework.** The solutions proposed by literary and artistic property law are varied. Among existing models (1.1.), several solutions must, according to the task force, be excluded (1.2.).

#### **1.1. Existing models**

**Diversity of mechanisms.** The existence of a market presupposes that rightholders are remunerated when cultural content is used. Different models are possible, from full contractual freedom to the establishment of a regulated market (some have even suggested the idea of “single price”): voluntary collective management, extended collective licence, mandatory collective management, legal licence or even compensated exception.



**Absence of justification for expropriation.** The further right the slider goes, the more the mechanism leaves behind the right to authorise or prohibit. Certainly, remuneration is in all events safeguarded—though the amount allocated may be subject to debate—but it is not, to be decisive, sufficient in itself. The power to authorise or prohibit—intrinsic to the legal and economic model of rightholders—must as far as possible also be preserved. The right recognised over cultural content is a property right over an intangible good. In other words, the consecration of an expropriating mechanism—in that it would set aside the exclusive right in favour of a single right to remuneration—is particularly delicate to envisage, especially regarding use of content for commercial purposes.

If such a mechanism is sometimes affirmed (thus, the legal licence in matters of lending rights, or the compensated exception for private copying), its impact is relative, due to limited harm, which is occasionally compensated, and precisely justified beyond the technical facilities it implies. In particular, the functioning of the lending right in libraries is explained by taking into account the general interest and the objective of access to culture and knowledge; the compensated exception for private copying finds its justification notably in respect for the right to private and family life, which opposes the holder being able to control the private use that the user makes of the lawfully acquired medium of the work, etc.

However, regarding the use of cultural content by AI, similar justifications are more difficult to conceive. It ultimately involves facilitating the development of an economic activity. Thus, a solution having the effect of expropriating rightholders could be censured by the supranational judge—at the Union level in the Court of Justice, as well as in the European Court of Human Rights—because considered disproportionate in that it would intervene without legitimate cause. Indeed, derogation measures retaining the right to remuneration (to the detriment of the monopoly) are never based on the need to allow a commercial activity to develop. Enacting a mechanism that leaves to one side prior consent

remains exceptional and must be justified<sup>165</sup>. In this way, enacting a right to remuneration in this area would constitute a disproportionate attack on property rights. Furthermore, this could also be considered as an attack on the freedom to conduct a business<sup>166</sup>, since the creation of such a mechanism would destroy any attempt to create a new market.

## 1.2. Excluded models

**Analysis of solutions with regard to safeguarding the holder’s will.** If the task force considers that the forms of negotiation and the determination of remuneration may vary—depending on the sector concerned but also on the use envisaged of cultural content, with, for example, price adjustments accounting for the value of data at each stage—this is not necessarily for remuneration models to prescribe. Indeed, the synthesis of interests and disadvantages specific to each major category of solution makes it possible to highlight an element which, even if it does not fall under strictly legal reflection, appears decisive for good acceptance—and therefore good application—of the rules prescribed for the future. Rightholders today feel deprived of their free will regarding the use of their cultural content by AI actors.

The massive exercise of opt-out is thus the symbol of a will not to purely and simply refuse use—or at least not systematically—but instead to oppose the uncontrolled use of content.

From this perspective, the safeguarding of free will—and, therefore, of exclusivity—should be as great as possible. The presentation of solutions could then be made in reverse, with regard to this criterion of preserved will:

- Compensated exception and legal licence appear unsuitable, insofar as they obscure a manifestation of will regarding the use of content. Consent would effectively be either useless (in the case of exception, in which the damage suffered due to the act is compensated), or automatically granted (in the case of legal licence). This would mean that the rightholder would have no possibility of opposing certain uses—for example, content generated “in the style of”. It should however be noted that the creation of a new exception, accompanied by a right to fair remuneration (and which would amount to establishing a compensated exception) is today a path considered by some<sup>167</sup>.

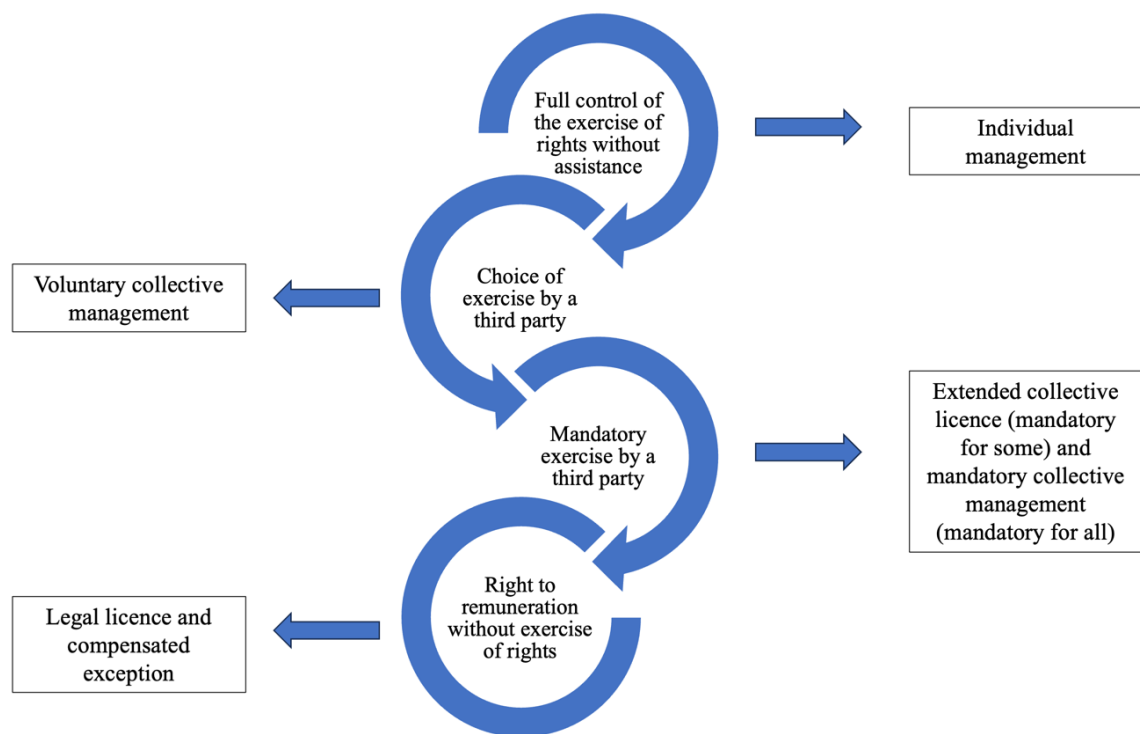
---

<sup>165</sup> In this regard, see notably CJEU, 6 March 2025, No. C-575/23, “Orchestre national de Belgique” and the Advocate General’s conclusions, C-575/23, EU:C:2024 923. On these elements, see also *infra*, Part 2, pt. 1.2.

<sup>166</sup> This is a fundamental right, enshrined in Article 16 of the Charter of Fundamental Rights of the European Union. The Court of Justice has moreover considered that this fundamental right includes the freedom to conduct a business, free competition, but also contractual freedom: CJEU, 22 Jan. 2013, C-283/11, “Sky Österreich,” pt. 42.

<sup>167</sup> In this regard, see the study for the European Parliament, *Generative AI & Copyright Balancing creative rights, legal integrity, and accountability in the AI age*, distributed by the Contexte website on 3 June 2025. p. 118. The report states “We propose the introduction of a new EU-level statutory exception to copyright for the specific purpose of training generative AI systems. This would be coupled with an unwaivable right to equitable remuneration for authors and rightholders whose works are used in such training. This model reflects the reality that individual licensing is unworkable at the scale and speed of AI training, while ensuring creators are not excluded from value chains driven by data. This long-term model does not undermine the short-term necessity to reaffirm the opt-in principle. Rather, it acknowledges that the existing framework lacks the structural capacity to support large-scale compliance in the context of generative AI. More fundamentally, the proposed remuneration mechanism responds not only to fairness concerns but to a systemic market failure: human creators are being structurally excluded from value chains due to the industrial scale, speed, and substitutive effect of generative AI outputs. In such a context, even collective opt-ins or voluntary schemes are insufficient to rebalance negotiating

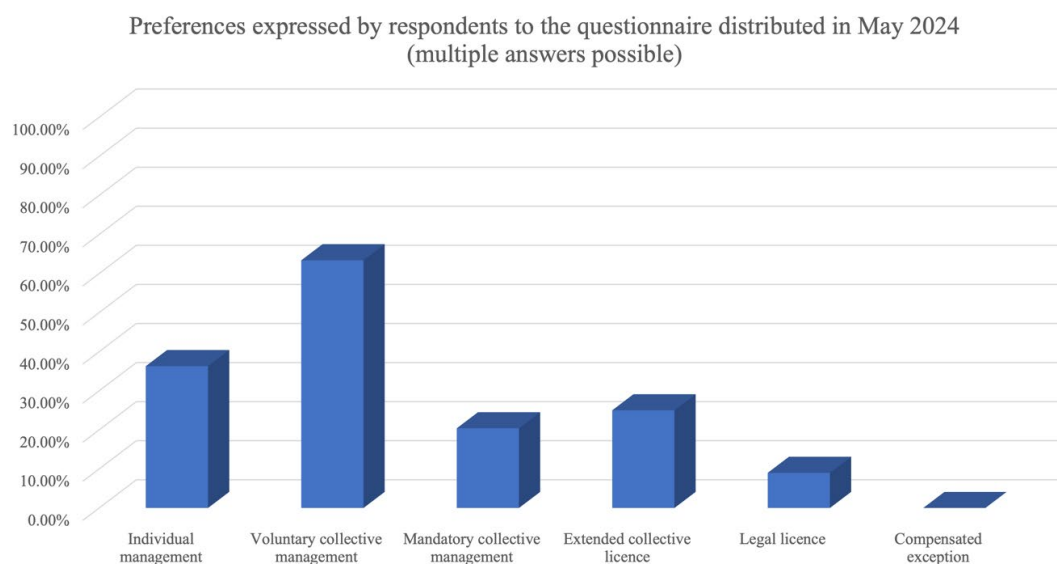
- Extended collective licence and mandatory collective management, if they preserve the existence of a manifestation of will, displace it to a third party (a collective management organisation) that rightholders may not have chosen to solicit. This is partially the case regarding extended collective licence, since the contract signed by the collective management organisation will extend its effects to its non-members; this is fully the case for mandatory collective management, which is imposed on all<sup>168</sup>.
- Both voluntary collective management and individual management preserve the will of rightholders. Rightholders can directly choose whether or not to sign agreements with AI providers (individual management) or opt, for practical reasons, for collective management, which would be neither extended nor imposed on them.



power. A statutory exception coupled with an unwaivable remuneration right addresses this asymmetry and restores minimum economic agency to authors whose works underpin the system.”

<sup>168</sup> European judges have moreover limited the possibility of establishing mandatory collective management mechanisms: CJEU, 16 Nov. 2016, case C-301/15, “Souliez et Doke.”

**Summary of opinions of respondents to the questionnaire distributed in May 2024.** The task force gathered advisory opinions from actors in the sector via a questionnaire distributed in May 2024<sup>169</sup>. The responses received, which were provided by all concerned parties, confirm the preference for solutions that accommodate the manifestation of will.



**Excluding intermediate solutions.** Mandatory collective management appears unsuitable, both in law<sup>170</sup> and in practice (some sectors practise it while others do not). It can therefore be usefully substituted by collective management that would remain voluntary.

Regarding extended collective licence, the failed Spanish example testifies to the fact that this is difficult to implement in the area. In this regard, it is not clear that such a mechanism would be valid. In particular, the “market failure” condition of Article 12.2 of the

<sup>169</sup> See appendix, summary table of responses to the questionnaire distributed in May 2024, *infra*, appendices.

<sup>170</sup> Rejecting the solution of mandatory collective management regarding online digital content distribution and peer-to-peer, see already *The distribution of digital content online*, CSPLA report, pres. P. Sirinelli, J.-A. Benazerf and J. Farchy, 2005, p. 68 et seq.: “the possibility of imposing the principle of mandatory collective management when the Directive of 22 May 2001, the Berne Convention and the other international treaties mentioned above to which France is party do not provide for the possibility of limiting the author’s freedom in exercising their exclusive right appears at the very least highly questionable; furthermore, [...] and unlike the mechanisms established within the framework of, for example, reprography or cable retransmission, the mandatory collective management society is imposed such constraints that the right conferred upon it loses its exclusive character. This results in an indisputable limitation to the principle of exclusive right incompatible with the Directive of 22 May 2001, the Berne Convention and the aforementioned treaties to which France is party.”

2019 directive<sup>171</sup> does not seem to be achievable in this area. As the market is in the process of emerging, it would be premature to identify a market failure now, thereby justifying the establishment of an extended collective licence.

Thus, it is better to set aside speculative solutions like this type of licence and opt for fully preserving the monopolistic approach.

**Excluding the simple right to remuneration.** Solutions based on a simple right to remuneration (legal licence, compensated exception) must be precisely framed with an express legal basis, or be founded on a requirement established by Union law. However, this would not be the case for a scenario as broad as use by artificial intelligence systems. The exclusive right can only be transformed into a right to remuneration in exceptional and clearly defined cases<sup>172</sup>.

The Court of Justice has moreover very recently had the opportunity to rule on the assignment, by regulatory means, of related rights of performing artists or performers in the absence of prior consent<sup>173</sup>. It states the principle with great clarity, and the analogy is useful here. It recalls first that “the rights guaranteed to performers [by European directives] are of a preventive nature, in the sense that any use of their [protected content] requires their prior consent [so that] any use of such protected subject matter by a third party without such prior consent must be regarded as infringing the holder’s rights”<sup>174</sup>; after which it considers that European legal provisions “preclude, in the absence of prior consent from the rightholders, the assignment, by means of a regulatory act, of the exclusive rights referred to in those directives, unless such an assignment

---

<sup>171</sup> Dir. 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, art. 12.2: “Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders.”

<sup>172</sup> In this regard, see conclusions of Advocate General Szpunar in the case, C-575/23, “Orchestre National de Belgique,” EU:C:2024 923, pt. 36 and 37: “36. Directives 2001/29 and 2006/115 provide for exceptions and limitations to the exclusive rights of performers. Thus, Article 5 (2) and (3) of Directive 2001/29 sets out an exhaustive list of exceptions to the rights protected under that directive, for which Member States are entitled to provide in their legislation. Similarly, Article 10 of Directive 2006/115 draws up a short list of possible exceptions to the rights protected under that directive, to which can be added the exceptions similar to those provided for in the domestic law of each Member State as regards copyright. (17) Moreover, the rights of broadcasting and communication to the public are limited in certain situations by virtue of Article 8 (1) and (2) of that directive. In particular, that paragraph 2 introduces a compulsory licence for broadcasting and communication to the public where performances are recorded on a phonogram published for commercial purposes, for an equitable remuneration for rightholders. 37. Those exceptions and limitations cannot however be used to turn all of the exclusive rights of a category or of a group of performers, by means of compulsory assignment, into a right to remuneration”.

<sup>173</sup> CJEU, 6 March 2025, No. C-575/23, “Orchestre national de Belgique.”

<sup>174</sup> Ibid., pt. 106.

is covered by one of the exceptions or limitations provided for by those directives, which are exhaustive in nature”<sup>175</sup>.

The Court therefore makes consent the primary lever for the lawfulness of using protected content, except in exceptional cases provided for by the directive. The creation of a compensated exception would finally only be possible at the European Union level, as Member States are not competent to create novel derogations from rights.

Beyond purely legal arguments that allow excluding mechanisms relating only to the right to remuneration, the task force also considers it useful to note that such a solution would have the perverse effect of denying the intrinsic value of each work. Indeed, the use of a little-sought-after work, or one of little value, would de facto imply the same automatic remuneration as a highly prized, high-value work. However, if merit is intended to remain outside the criteria for access to justice<sup>176</sup>, it is, on the contrary, likely to have an impact as frequent as it is natural on the success—and therefore on the value—of the work at the exploitation stage. The enacting of a solution based on legal licence or compensated exception would amount to denying this key element of the exploitation of a work, even though data value has a central place in AI structuring.

Finally, and though limited, the existence of licences around the globe—in France, Germany, the United States—cannot be ignored. Adopting a contrary system would amount to imposing a solution limited to France for a problem that affects the entire world.

## 2. The task force’s preference

**Breakdown.** In light of the various elements previously stated, the task force considers that a model can be preferred (2.1.) which preserves contractual freedom while offering the possibility of mass authorisation. Once the proposal formulated, it remains to determine many intrinsic aspects of remuneration, such as criteria (2.2.) and modalities (2.3.). Furthermore, the question of data value (2.4.) is naturally central, and can be taken into account *in concreto* thanks to individual management. Lastly, if these proposals focus on the present and the future, the task force nevertheless does not neglect the past (2.5.).

### 2.1. The chosen model

**Pertinence of the proposed solution.** The necessity of creating a sustainable and secure market; the existence of supplier-client relations that must flourish in a framework of equal negotiation; the fair counterpart to the use made of content: all these elements mean that the recommendation would be, today, that of safeguarding consent and therefore contractual freedom (which implies a principle mechanism based on individual management)

---

<sup>175</sup> Ibid., pt. 107. – On the implications that this decision could have on certain mechanisms in France, see P. Kamina, CCE Apr. 2025, comm. 30.

<sup>176</sup> Art. L. 112-1 CPI.

backed by voluntary collective management to accompany those rightholders who would not be able to grant authorisations, or who would simply find it easier to work through an organisation<sup>177</sup>. This solution would have a double advantage, in that it preserves the decisive and central principle of literary and artistic property law which is the power to authorise or prohibit, while also offering the possibility (but not the obligation) to solicit the accompaniment of collective management organisations, where applicable. Moreover, other voices are currently making themselves heard, including internationally, to plead in favour of safeguarding individual negotiation<sup>178</sup>.

Furthermore, the preservation of this freedom appears essential, especially in certain sectors. Thus, for instance, in audiovisual media, the right to revenues of producers, after they have had rights assigned to them, is a powerful tool for negotiation, particularly—but not exclusively—with regard to broadcasters. This revenue—which largely results from licence contracts (including with AI providers)—allows investment in new projects. For this reason, the loss of exclusivity would be extremely harmful.

Finally, the proposed model appears consistent with the Berne Convention and other international commitments to which France is party.

**Maintaining the principle of proportional remuneration.** A priori, there is no justification for questioning the principle of proportional remuneration, from which authors and performing artists benefit. Some have argued in favour of applying Article 18 of Directive 2019/790 and appropriate and proportionate remuneration “at all relevant stages of AI models”<sup>179</sup>. Though it is conceivable that proportionate remuneration might not be proportional but instead fixed, the first hypothesis is nonetheless occasionally defended<sup>180</sup>.

---

<sup>177</sup> See, proposing a range of different possible solutions, differing according to the sectors concerned, V.-L. Benabou, “How to align creators with the value produced by the use of their works by artificial intelligence systems?”, CCE April 2025, study 7, No. 28. The author notably identifies, among the possible avenues: “A path to explore would consist of combining freedom of use with mandatory payment of remuneration, similar to the statutory licence in broadcasting or compensated exception systems (private copying),” which would allow “imposing mandatory collective management.”

<sup>178</sup> In this regard, see notably, recently, IFPI, *Generative AI Models at the Gate Licensing frameworks for the effective and efficient protection of copyright protected content in an AI world*, 3 Apr. 2025, available at the following link: <https://compass-lexecon.files.svdcdn.com/production/editorial/2025/04/Generative-AI-Models-at-the-Gate-Report-for-IFPI-Compass-Lexecon.pdf?dm=1743758320> which identifies both the feasibility and flexibility of individual negotiation.

<sup>179</sup> *Copyright and Generative AI: Opinion of the European Copyright Society*, Jan. 2025, p. 12: “Art. 18 of the CDSM Directive mandates, as a general principle, that authors and performers receive an appropriate and proportionate remuneration for acts of exploitation of their works and performances in all relevant stages of operation of generative AI models and systems (from training to post-training commercial exploitation of generative AI models, as well as exploitation of generated content similar to their works or performances).”

<sup>180</sup> In this regard, see notably CREATE working paper 2025/1, *Copyright and generative AI: response by the CREATE centre to the UK government’s consultation*, Feb. 2025, p. 34: “Overall, we would expect intermediaries to pass on at least 50% of such proceeds to the creators (as has been frequently the case with electronic rights in publishing contracts), though we acknowledge that some account may need to be taken of the costs involved for the publisher/intermediary in making the data available to the AI developer in an appropriate format.” The report is accessible via the following link: <https://www.create.ac.uk/blog/2025/02/26/copyright-and-ai-response-by-the-create-centre-to-the-uk-governments-consultation/>



In any event, such an application of Article 18, though appropriate in principle, can sometimes face difficulties of two orders, especially if it is proportional remuneration (and no longer only proportionate) that is envisaged.

First, on the issue of scope, such remuneration enacted indifferently at any stage could be difficult to apply in practice. On the one side, what would be, for example, the remuneration and its calculation methods in titanic datasets at the pre-training stage? How could the basis of remuneration be determined in case of proportional remuneration? On the other, the task force recalls that Article 18 only concerns authors and performing artists, so that the solution based on this provision would not address other holders of related rights who have an equally legitimate claim to receive remuneration.

Next, on the issue of technical implementation, certain solutions can today allow calculation of the proportion of content used to deduce an equally proportional price. However, this must come with certain qualifications, which will sometimes limit the interest of such an approach. In the first instance, these technical tools, which are based on similarity metrics<sup>181</sup>, presuppose knowledge of the training base, which would rarely be the case in practice. Furthermore, these methods today allow identification of elements (even sporadic ones) that are found in the output (by a similarity score), but they struggle to identify the reproduction of a style, a genre, etc. If these are naturally not protected per se by literary and artistic property law, their presence nevertheless testifies to the fact that cultural content has been absorbed by AI at the training stage, demonstrating that reproduction has indeed taken place. Think, for instance, of the generative image AI that “imitates” the style of Studio Ghibli. There will not necessarily be reproduction, in the generated image, of a tree shown in *Princess Mononoke* or a kingdom drawn from *Howl’s Moving Castle*—elements that the tool could recognise. However, the generated content is the fruit of the assimilation and fusion of this studio’s content to produce a result that is at once similar and different. Such a method thus reveals its limits, both on the amount that rightholders could claim and on the methods possibly implemented to evaluate the proportions of “reproduction.”

Lastly, how does one determine the number of times users of generative AI will obtain a result that resembles (and to what degree, seeing as copying is never strictly servile with AI) protected cultural content? And, even if such observation were achievable in practice, what would be the calculation basis for this remuneration? How would it be distributed? The situation will occasionally be perceived by certain holders as unnecessarily complex, not least because it would ultimately allow the holder—who would have overcome all stated obstacles—to receive a reduced percentage of a very small sum.

Though it remains legitimate in principle, proportional remuneration is therefore not the only possible path. Fixed remuneration—which is a matter of exception—could in certain scenarios represent a preferable solution.

---

<sup>181</sup> These developments are based on PEReN’s work: “Generated and original artistic content: an approach to identify their similarity in an image dataset,” <https://www.peren.gouv.fr/perenlab>.

**Sectoral opportunity for fixed remuneration.** In view of the system’s complexity and the mass of data used, and without being able to evaluate the precise impact piece of content by piece of content, it could be appropriate to derogate from the proportionality principle in favour of fixed remuneration, which is easier to set and, sometimes, more profitable for rightholders.

Though fixed remuneration is certainly the exception for both the author<sup>182</sup> and the performing artist<sup>183</sup>, it is authorised specifically when the calculation basis for proportional participation cannot be practically determined, or when the means to control the application of participation are lacking. It appears to the task force that these exceptional situations do as a matter of fact take place regarding the use of cultural content by AI, meaning that this form of remuneration is possible on a legal level. Fixed remuneration will even, in some cases, appear more protective of the rightholder’s interests. It could be calculated distinctly according to a multitude of criteria: phase concerned, mode of use, economic weight of the contractor, etc<sup>184</sup>. It could also be a series of fixed remunerations (annually, for example, so long as the model is operated, or alternatively at each retraining or new model version, with the contract determining such recurrences). Furthermore, for certain related rights, fixed remuneration is the standard principle. In this case, fixed payment is a major source of remuneration and (pre)financing of works, particularly audiovisual media.

Also, at this stage of market maturation, fixed remuneration can present advantages that are by no means negligible. Within this framework, it is even conceivable that fixed remuneration remain “provisional” while business models stabilise.

**Relevance of mixed remuneration.** The two forms of remuneration—proportional or fixed—present varying appeal according to each specific circumstance, meaning that it will be up to the parties to analyse the situation so as to determine the appropriate solution. Contractual freedom allows parties to choose the option that appears most relevant in a given case. In fact, it authorises not only the choice between these forms, but also a combination of the two.

It would therefore not be impossible to opt for a form of mixed remuneration, with a fixed part and a proportional remuneration part<sup>185</sup>. Mechanisms combining a guaranteed minimum below a certain revenue threshold, with proportional remuneration beyond this threshold, are already implemented in some existing agreements (though outside AI).

The slider will therefore be placed in contemplation of the parties’ will; if the task force considers it useful to highlight the specific interests of the derogation-based solution that is fixed remuneration, it prefers no form of remuneration to another and considers that the decision must naturally be negotiated contract by contract.

---

<sup>182</sup> Art. L. 131-4 CPI.

<sup>183</sup> Art. L 212-3 CPI.

<sup>184</sup> On the possible criteria, see *infra*, Part 2, pt. 2.2.

<sup>185</sup> On the different remuneration models, see *infra*, Part 2, pt. 2.3.

**Absence of precedent.** Lastly, and especially in a market in the process of maturing, it seems essential to recall that remuneration conditions that would begin to emerge could not constitute precedents likely to bind actors for years to come. In this regard and by analogy, Article L. 324-6 of the Intellectual Property Code stipulates in its final paragraph that the conditions for granting exploitation authorisations to a provider of new online services available in the European Union for less than three years cannot constitute precedent for determining the conditions around granting other authorisations<sup>186</sup>. Admittedly, the provision only concerns collective management organisations, but it could see its scope extended to guarantee that these precedents cannot be opposed to other authorisations. Contractual freedom would thus be fully preserved.

## 2.2. Remuneration criteria

**Influence on remuneration of substituting human content with synthetic content.** The possible substitution of human content by synthetic content represents an existential challenge for certain cultural sectors. The threat is alive and real. For instance, Deezer revealed that in 2025, 18% of music uploaded daily to its platform is entirely generated by AI—more than 20,000 songs a day. The company chose to develop a synthetic song detection tool, for the purpose of excluding them from algorithmic recommendations and playlists, and to protect the rights and revenues of human artists.

All the same, the market could see value in shifting towards AI-generated production, which is faster and less costly.

In addition to requiring public policies, this potential substitution could constitute a criterion for influencing remuneration. Some envisage making pay those that shift towards artificial productions at the expense of human creations<sup>187</sup>.

One can, moreover, identify a sub-criterion for characterising this substitution, which concerns the destination of the AIS (AI System). Indeed, an AI serving the health or insurance sector does not have the same impact as an AI whose generated content enters directly into competition with human cultural content. This criterion could, however, prove difficult to delimit, for several reasons. Can the criterion be taken into account at all identified stages (pre-training, fine-tuning, RAG) and, if so, should it be accorded more or less importance

---

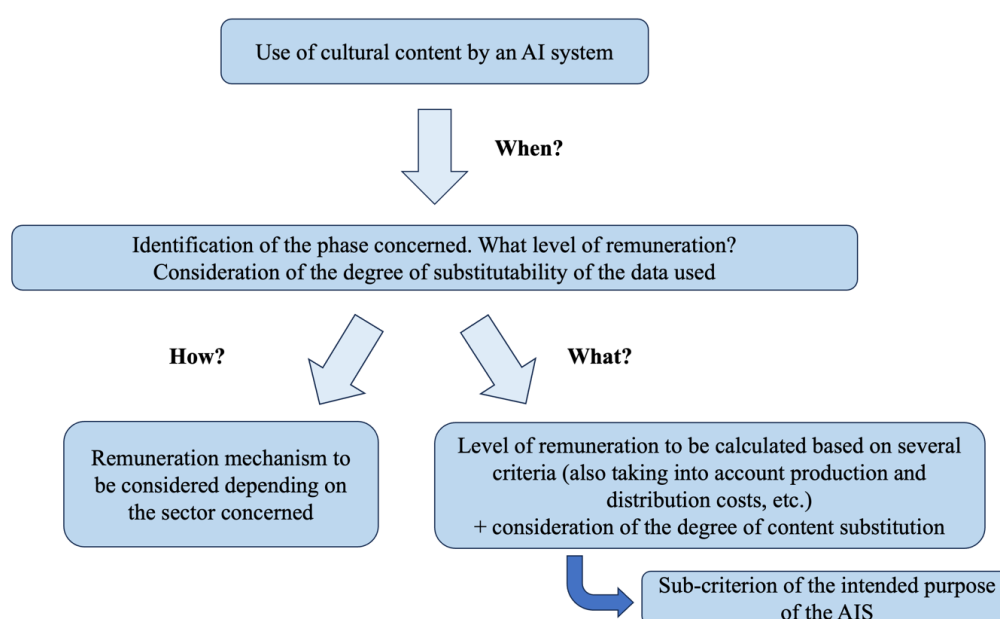
<sup>186</sup> Art. L. 324-6, para. 4 CPI: “When exploitation authorisations are granted by a collective management organisation to a user providing a new type of online service made available to the European Union public for less than three years, the conditions for granting these authorisations shall not constitute precedents for determining the conditions for granting other exploitation authorisations. The three-year period runs from the first contract concerning the service in question.”

<sup>187</sup> Evoking a new application of Victor Hugo’s idea of “paying public domain”: V.-L. Benabou, “From the three-step test to paying public domain - Some ideas for better aligning rightholders with the production of generative Artificial Intelligence in the field of intellectual creation,” Dec. 2023: <https://vlbenabou.blog>. – Comp. M. Sentfleben, “Generative AI and Author Remuneration.” IIC - International Review of Intellectual Property and Competition Law, Nov. 2023, vol. 54, p. 1535, available online.

depending on the phase? How should one treat general-purpose AI (which does not have a specific function)? What about in the case of a change in the AI's originally intended function?

This sub-criterion will therefore be difficult to handle. Nevertheless, it seems useful at this stage of reflection to mention it, in order to develop the idea of content substitution.

**Conceivable criteria.** The three criteria identified in the progress note<sup>188</sup> (phase concerned, sector organisation and substitution/destination) have different values. The main criterion seems to be that of usage phases or stages leading to content generation by AI. On this point, if establishing data value presupposes analysis of the task force's economic aspect, it is probable that the less the data used is interchangeable<sup>189</sup>, the more their value increases. Yet, the degree of data interchangeability is variable according to the phase concerned. There would then be an overarching criterion that would determine the moment for remuneration, allowing an answer to the question of "when?", as well as specific criteria once it has been established that the phase concerned gives rise to remuneration. The content substitution criterion would integrate into the question of "what?" (that is, what is the measure of remuneration envisaged?) while that of sector organisation would answer the question of "how?" (how can remuneration be conceived?).



<sup>188</sup> Legal interim note, *Report Task Force on remuneration for cultural content used by artificial intelligence*, CSPLA, Dec. 2024, op. cit., p. 12 et seq.

<sup>189</sup> Note, what is being discussed here is the substitutability of training data and not the substitution of human content by synthetic content.

### 2.3. Examples of remuneration models

**Propositions.** Certain contractual models are emerging from among rightholders.

In the United Kingdom for example, the Copyright Licensing Agency (CLA), which is directed by the Publishers' Licensing Services (PLS) and the Authors' Licensing and Collecting Society (ALCS), representing publishers and authors, recently announced that a "pioneering" licence will be made available to AI developers in summer 2025, allowing copyright holders "who are not able to negotiate direct licensing agreements with AI developers" to be remunerated for the use of their works<sup>190</sup>.

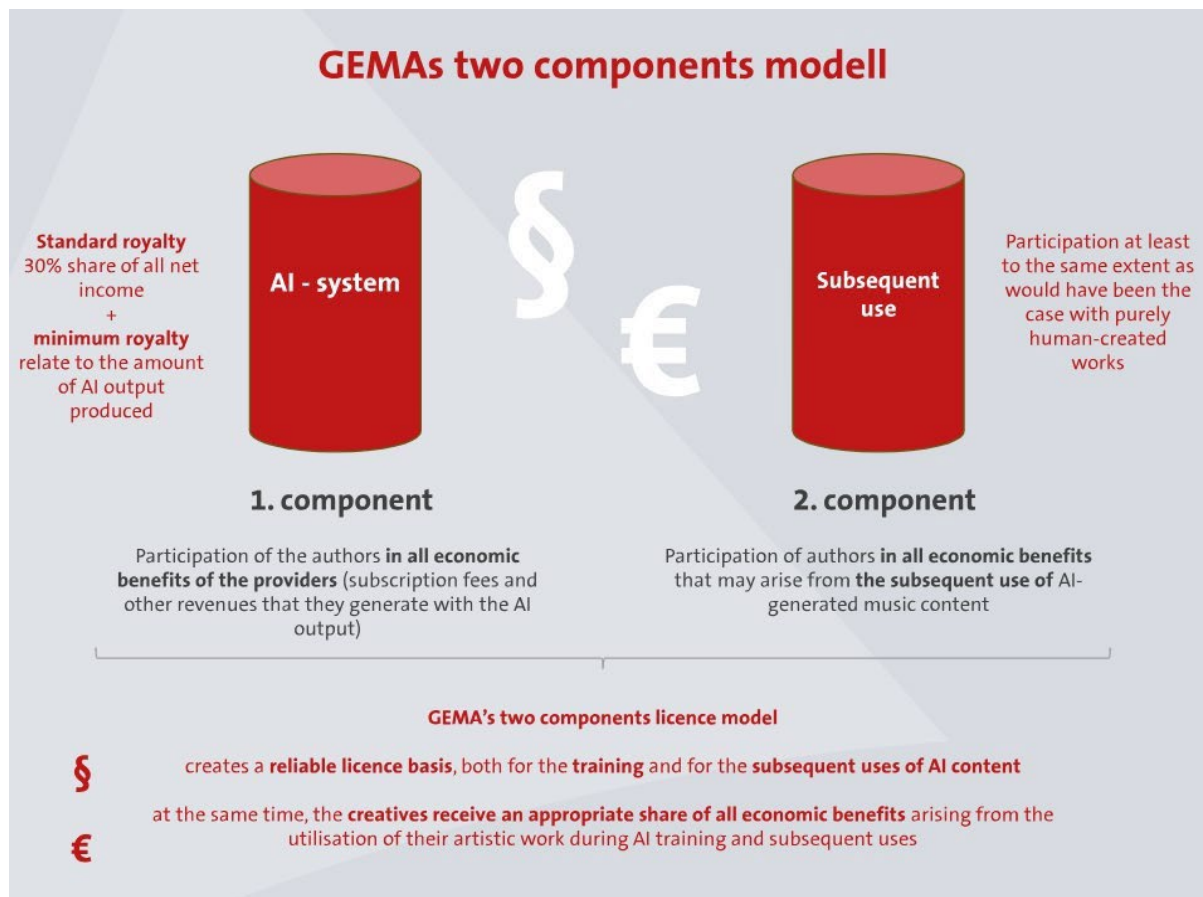
In Germany as well, the organisation for rights on musical performance and mechanical reproduction (GEMA) has proposed a remuneration model based on two components<sup>191</sup>, taking into account, on one hand, the use of content for AI training and, on the other hand, the value generated by content produced by AI. The economic benefits generated by AI should therefore be partly shared with rightholders whose content is used. The licence contracts would then cover not only the training phase but also "all economic benefits that can arise from the subsequent use of AI-generated music content," which would notably authorise that "rightholders will so receive an appropriate share of the additional income generated by AI-produced songs [that must be] at least equivalent to what would have been provided for purely human-generated works"<sup>192</sup>. This dual approach is based on double remuneration "for absorption/regurgitation."

---

<sup>190</sup> <https://www.theguardian.com/books/2025/apr/23/collective-licence-to-ensure-uk-authors-get-paid-for-works-used-to-train-ai>

<sup>191</sup> GEMA's proposal is accessible via the following link: <https://www.gema.de/en/w/generative-ai-licensing-model>

<sup>192</sup> For both citations, *ibid*.



*Graph concerning the remuneration model proposed by GEMA and available on its website*

**Critical analysis of GEMA's proposal.** The reasoning based on a share of benefits generated by AI will necessarily be subject to dialogue between parties, which will be translated into the contract. The proposal is original in that it identifies a duality of intervention moments for remuneration.

The fact that the choice of these remuneration triggering times remains in the parties' hands seems necessary, however, and could not be subject to a global and undifferentiated approach, insofar as each case is different. Thus, the contract could opt for remuneration due at the training stage, at the generation stage, or at both stages<sup>193</sup>. However, it could prove very complicated to exercise this "droit de suite" on synthetic content. Therefore, the choice of (at least partially) fixed remuneration, determined by reference, for example, to the AI provider's turnover, rising with both the quantity and with data value and rarity, could

<sup>193</sup> In this regard, see also IFPI, *Generative AI Models at the Gate Licensing frameworks for the effective and efficient protection of copyright protected content in an AI world*, op. cit.: "From an economic point of view, what matters for end-consumer welfare is that content creators are appropriately rewarded for their value-increasing investments, irrespective of which level or levels of the value chain benefiting from those investments are asked to contribute. The remuneration received by copyright holders should be independent of the level of licensing – it could be at the training level, or the deployment level, or indeed even split across the two levels. Instead, the choice of licensing level should aim to achieve the minimisation of transaction costs. These are invariably specific to the technical, legal and market conditions at hand, and therefore the appropriate level would have to be determined on a case-by-case basis".

appear judicious and undoubtedly more profitable for rightholders. But here again, parties could remain free: some could find the fixed payment more appropriate for everything, while others retain only proportional remuneration, and still others choose fixed payment for training but proportional remuneration for generation. One of the contract's chief interests lies precisely in this great malleability, which other solutions do not allow.

**Other models.** Other value models are emerging in practice. Alongside the classic licence, which privileges property and control over usage conditions, platforms offer access to datasets via APIs, in return for subscriptions or fixed payments. We find this “Data as a Service” (DaaS) model, founded on a rationale of fluid and continuous data consumption, for example on Infogreffe<sup>194</sup>. Furthermore, the counterpart could itself be partly linked to using the AI solution. The press could, for example, have an interest in this.

## 2.4. Valuation

**Double approach.** Valuation is naturally central in establishing remuneration. The question, which mainly falls under the economic study of the subject, will only be addressed here from a legal perspective. As such, it appears that this value should be analysed through the prism of the data itself (2.4.1.), but also through that of its use (2.4.2.).

### 2.4.1. Data value

**Difficulty in establishing data value.** Because data is a non-rival good (the supply of which is not exhausted by its use), its value may seem difficult to determine precisely. Due to its ubiquity, data can multiply without necessarily losing value. On the contrary, its exploitation generally empowers it to acquire superior value.

An additional difficulty thus appears, now well known to economists. Most digital services today offered by AI providers are, in appearance, “free,” even if so-called premium versions are also available by paid annual or monthly subscription. In other words, the user very often has access, without direct monetary exchange, to services offered by AI<sup>195</sup>, which adds to the complexity of price calculation.

---

<sup>194</sup> <https://datainfogreffe.fr/>

<sup>195</sup> It should be remembered, however, that this “free” nature is only apparent, since the user “pays” by means other than financial consideration, through the collection and exploitation of their personal data in particular.

**Importance of data.** However, if a company's activity is based on data exploitation, then this means that it has central value for the operator. The Directorate General of the Treasury report states unambiguously in this regard that “from an economic point of view, the utility and value of an AI model rest on access to and mobilisation of numerous and quality data”<sup>196</sup>. The first observation is therefore that of the unavoidable character of access to data and, therefore, to cultural content subject to protection, so that the model can not only build itself but also prove effective. Nevertheless, the volume of data required makes calculating a price to pay complex. The growing development of small specialised models could, however, strengthen the intrinsic and individual value of data. In becoming rarer, this should acquire greater value.

**Value variability.** A first criterion for data price variation consists in the remuneration model adopted. It would seem that negotiation generally affords better remuneration<sup>197</sup>. A distinction according to data usage phases thereafter appears inevitable. In the pre-training phase, a large model trains on masses of non-specialised data, with an important challenge regarding transaction cost reduction. Thus, data value is further reduced. Conversely, in the fine-tuning phase—fine-tuning, grounding, RAG—quality substitutes for quantity; models need less data, and these are then more specialised and endowed with superior value. The price will therefore be greater, because holders will obtain strong market power.

However, this is not about claiming that data provided en masse has no value. Such data is necessary and used for pre-training models. Without a solid foundation, the edifice collapses; the distinction therefore only concerns valuation, not the existence of value itself.

Price setting must be established through dialogue and negotiation, even if discussions can be conducted sector by sector, though it is obvious that licence price will increase concomitantly with content value<sup>198</sup>. Furthermore, this value can be assessed with regard to the success of a work, an author, a performing artist, catalogue completeness, etc. All these elements will therefore be taken into account case by case in each contract to determine the intrinsic value of data.

---

<sup>196</sup> Directorate General of the Treasury, *The artificial intelligence value chain: economic issues and France's position*, Dec. 2024, p. 7.

<sup>197</sup> See in this regard, identifying the variability of costs according to the type of mechanism adopted, the highest being that of individual negotiation, USCO, *Identifying the Economic Implications of Artificial Intelligence for Copyright Policy Context and Direction for Economic Research*, Feb. 2025, p. 53: “The option that presents the lowest transaction costs is unrestricted access, followed by a statutory licensing system. Systems that require private negotiation will have the highest transaction costs. However, as previously discussed, some of that can be mitigated through collective intermediation.”

<sup>198</sup> In this regard notably, see France Digitale, *Generative AI and copyright: what place for protected European data in the AI era?*, Dec. 2024, p. 26: “the more content is viewed as desirable, the more the price of this licence increases.”



#### 2.4.2. Use value

**Negotiation cost.** If individual management has numerous advantages, it nonetheless presents the disadvantage of higher cost. In addition, bidding for use through the meeting of wills would induce costs that could discourage certain entities. This obstacle is not, however, insurmountable. Certain analyses thus underline the fact that the higher cost represented by negotiation compared with free use or legal licence can be partly reduced by the role endorsed by collective management organisations, due to the centralisation of negotiations that these afford<sup>199</sup>.

Such analysis reinforces the interest of the path of pooling rightholders' forces, who would thus have the capacity to offer large, quality catalogues, allowing them to acquire greater market power.

**Price adjustment.** Beyond this, rightholders could adjust prices to given circumstances. Here again, while the most reductive solutions to the expression of consent (like legal licence) have the effect of standardising the amount due, the contract imposes itself on the contrary as “the legislator of specific cases”<sup>200</sup>. This adjustment would be all the easier as such flexibility is not out of place when exercising literary and artistic property rights. Rightholders are already accustomed to the exercise of adapting prices according to different scenarios of proposed use (purpose of use, economic size of the co-contractor, etc.). By way of illustration, the cost charged for using a work of graphic design on a charity's communications medium will not be the same as if the same work is inserted in an advertising campaign organised by a company in the fashion sector and displayed in many cities. Price modulation is therefore at the very centre of the exercise of rights, and rightholders—either directly, or through collective management organisations acting on mandate—could naturally practise it in the case of cultural content used by AI.

The signing of non-exclusive licences moreover allows price adjustment for the same content according to the interlocutor and type of use envisaged. To this end, the Competition Authority has, on the subject, recently noted that such price differences were perfectly possible<sup>201</sup>.

---

<sup>199</sup> USCO, *Identifying the Economic Implications of Artificial Intelligence for Copyright Policy Context and Direction for Economic Research*, Feb. 2025, p. 49. Add. p. 53: “Transaction costs should play a central role in policy comparisons. These costs are likely the largest barrier to the endogenous formation of licensing markets. The option that presents the lowest transaction costs is unrestricted access, followed by a statutory licensing system. Systems that require private negotiation will have the highest transaction costs. However, as previously discussed, some of that can be mitigated through collective intermediation.”

<sup>200</sup> The expression, borrowed from Georges Ripert, originally refers to the judge. It is however also adapted to contracts, the law of the parties.

<sup>201</sup> French Competition Authority, Opinion 24-A-05 of 28 June 2024 relating to the competitive functioning of the generative artificial intelligence sector, pt. 258: “Digital data economically constitutes a non-rival good: in other words, selling data to one actor does not a priori limit the capacity to sell the same data to another actor, possibly at a different price. The question of incentivising content providers to conclude such differentiated agreements nevertheless arises, and to the Authority's knowledge no press publisher has, to date, signed agreements with several model developers at different prices.” The opinion is accessible via the following link: [https://www.autoritedelaconcurrence.fr/sites/default/files/integral\\_texts/2024-07/24a05\\_merged.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2024-07/24a05_merged.pdf)

**Price adaptation and information.** However, if the rightholder (or their representative acting on mandate) wants to adjust price, particularly because value can vary according to the usage phase concerned, they still need to have the necessary information to do so. Indeed, such adjustments can only be achieved given sufficient knowledge of concrete uses. Yet, silence on this issue on the part of AI providers will likely prevent collective management organisations from fulfilling their obligations.

The directive of February 26, 2014 concerning collective management of copyright and related rights<sup>202</sup> states on this point, in its Article 16.2, paragraph 2 that “Rightholders receive appropriate remuneration for the use of their rights. Tariffs applied for exclusive rights and remuneration rights are reasonable, with regard, among others, to the economic value of the use of negotiated rights, taking into account the nature and scope of use of works and other objects, as well as with regard to the economic value of the service provided by the collective management organisation. Collective management organisations inform the concerned user of criteria used to set these tariffs”<sup>203</sup>. In this regard, opacity prevents adjustment.

European judges have, moreover, had occasion to affirm that national legislation can stipulate that an entity charged by a collective management organisation with managing private copying compensation refunds can “request access to information necessary for exercising control competences with which it is invested in this capacity, without it being possible, notably, to oppose commercial accounting secrecy provided by national law, this legal person being obliged to safeguard the confidential character of obtained information”<sup>204</sup>. Thus, an identical solution could be envisaged regarding remuneration of cultural content by AI: when contracts are agreed by collective management organisations, said organisations must be able to access all relevant information to set prices.

**Range of price establishment criteria.** Price is therefore likely to vary according to envisaged uses, with AI providers responsible for guaranteeing transparency by providing sufficient information on this subject. But other elements can influence price. Studies propose, for example, dynamic pricing models<sup>205</sup> with multiple criteria: user expectations (which includes satisfaction of their needs and value that data represents for them);

---

<sup>202</sup> Directive 2014/26 of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

<sup>203</sup> Add., for transposition, art. L. 324-6 CPI. This provision moreover reinforces the need for transparency expected from AI providers. Without such transparency, it is impossible to establish remuneration in consideration of the different criteria mentioned (economic value of use, nature and extent of such use, etc.).

<sup>204</sup> CJEU, 8 Sept. 2022, case C-263/21, “Ametic”.

<sup>205</sup> On this question, see notably R. Majumdar, A. Gurtoo, and M. Maileckal, “Developing a data pricing framework for data exchange,” *Futur Bus J* 11, 4 (2025), accessible via the following link: <https://fbj.springeropen.com/articles/10.1186/s43093-025-00422-z>

data characteristics; market structure and maturity; organisational objective; and provider reputation.

This variety of elements allowing a price to be set also reaffirms the specificity of a given situation. Consequently, recourse to contract—directly with the holder on an individual management system or through collective management organisations acting on mandate—seems the most fitting solution for structuring the data market.

**Difficulty to account for effects on employment.** Beyond these solutions, one path could consist in incorporating the effects of AI use on employment in the overall remuneration calculation. These harmful effects are understood as a negative externality<sup>206</sup>, which is very difficult to take into account in the licensing contract. The latter cannot allow for a broad understanding of the negative effects of AI use on the employment of cultural content creators.

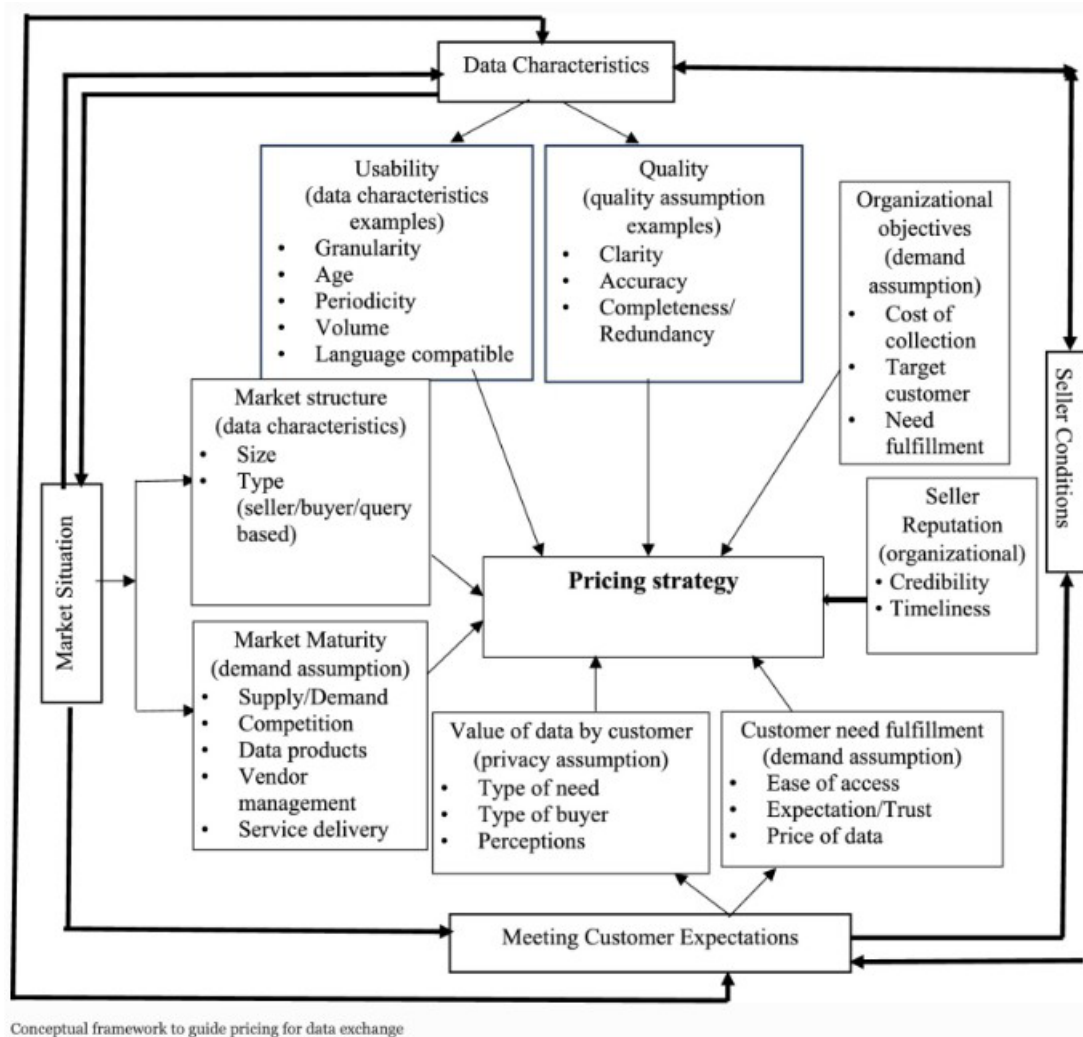
However, this failure could be put into perspective by the possibility of internalisation—in other words, the contract can regulate the effects that AI use produces on the contracting party themselves. In this framework, each contracting party will be able to negotiate, in the remuneration terms, the consideration of these effects.

This finding reinforces the importance of large-scale negotiations, with grouped rightholders or through collective management organisations or technical data providers<sup>207</sup>. If the contracting party does not represent a single rightholder but numerous rightholders, the internalisation via contract of negative effects on employment could, without doubt, be taken into account more broadly.

---

<sup>206</sup> Negative externality refers, in economics, to the concept describing the negative consequences of a given activity on other actors, without these being compensated.

<sup>207</sup> On these solutions, see *infra*, Part 3, pt. 3.



## *Developing a data pricing framework for data exchange<sup>208</sup>*

### 2.5. The price of the past

**Possible ways to settle past uses.** The task force wishes to recall that these proposals are based on the idea that the price paid is in exchange for the use of content. Yet, we know that for existing models, data has already been employed without authorisation by AI providers, which then raises different questions concerning the temporality of the presented solutions. How is one to settle these past illegal situations? Given the current state of technology, it is unfeasible to ask the machine to

<sup>208</sup> The diagram is borrowed from R. Majumdar, A. Gurtoo, and M. Maileckal, “Developing a data pricing framework for data exchange,” op. cit., accessible via the following link: <https://fbj.springeropen.com/articles/10.1186/s43093-025-00422-z#Fig2>

unlearn something, at least in the pre-training and fine-tuning<sup>209</sup> phases. For this reason, the past cannot be erased. Within this framework, how is one to repair the harm and cease infringements?

Three paths are conceivable:

- The litigation path: suits, on the ground of counterfeiting, are already initiated or announced. It would then be possible, in the calculation of damages, for rightholders to request the integration of “advantages realised by the author of the rights infringement, including intellectual, material and promotional investment savings that the latter drew from the rights infringement,<sup>210</sup>” insofar as the wrongful act committed by AI providers in this scenario is incontestably an act that is a source of advantage. This possibility of restitutionary damages, derogating from the principle of full reparation, has been authorised by European Union law.
- The contractual path: the signing of retroactive contracts, which would cover uses prior to the emergence of a new market, could also be supported. What is more, the signing of agreements for the future could contain a negotiated validation clause concerning past use.
- The path of compensation by a fund: the establishment of a compensation fund, financed by AI providers, could compensate for prior unauthorised uses. In this regard, an obligation of compensatory negotiation could be envisaged, to compensate for prior unauthorised uses. That being said, the solution remains imperfect in that it does not settle the question of absence of consent to the use of protected content.

Beyond this, regarding elements incorporated into the model from training operations covered by the text and data mining exception, it would seem that, following the principle of useful effect often invoked by the CJEU, the opt-out provided in Article 4 could effectively prohibit not only acts of reproduction of works or objects concerned for the future, but also the use of elements resulting from past reproduction acts. On this point, if the requirement for complete reconstruction of the model purged of unauthorised content appears disproportionate, the same is not true for payment of remuneration to rightholders.

**The European position?** At the date of this report, the European position does not seem fixed regarding taking the past into account. The Commission has however opened, on April 22, 2025, a public consultation for the purpose of drafting guidelines on general-purpose AI models, announced as complementary to the Code of Practice (the publication of which has been deferred as a consequence). The document indicates that models placed on the market before the AI Act comes into application (August 2, 2025 for Article 53 1 [c and d], respectively on the compliance obligation and on the template for the sufficiently detailed summary) must be brought into compliance before August 2, 2027. However, the approach does not require

---

<sup>209</sup> It seems conversely easier to ensure that AI can no longer resort to protected cultural content in the RAG phase, insofar as there it is not a matter of absorption but of real-time consultation of this content.

<sup>210</sup> Art. L. 331-1-3 CPI.

“retraining” of prior models “when implementation of copyright compliance measures is not possible for actions carried out in the past, when certain information relating to training data is not available, or when their recovery would entail a disproportionate burden for the provider”<sup>211</sup>.

If the document adds that these hypotheses must be clearly justified and disclosed in the compliance policy and summary of content used for model training, it is also necessary to question the counterpart to “making licit” past uses.

**The need for public policy.** Beyond this, the risk of human created content being replaced by content generated by AI must be identified; it has already been seen in certain sectors<sup>212</sup>. The risk of substitution must certainly not relegate to the background the decisive reflection conducted on the grounds of respecting literary and artistic property rights; rather, it should be taken into consideration and corrected as much as possible by public policy, if necessary on the economic level (some holders propose conditioning some public funding on recourse to humans and not to AI, etc.). If harm from replacement can never be fully compensated, this mechanism would nevertheless have real utility.

Such action does not fall within the task force’s scope, but it seemed essential to draw attention to this additional challenge, especially because the AI Act recalls that “cultural diversity”<sup>213</sup> is one of the seven ethical principles established by the AI HLEG in its guidelines, ensuring that AI is trustworthy and ethically sound. Yet, there cannot be cultural diversity if human creation is fated to disappear in the face of AI-generated synthetic content<sup>214</sup>.

**From the possibility of a market to its implementation.** The market under discussion is necessary and possible. But there is still more to do. It remains necessary to facilitate its implementation.

---

<sup>211</sup> [https://ec.europa.eu/eusurvey/runner/GPAI\\_Guidelines\\_Consultation\\_2025](https://ec.europa.eu/eusurvey/runner/GPAI_Guidelines_Consultation_2025); *Targeted consultation in preparation of the Commission Guidelines to clarify the scope of the obligations of providers of general-purpose AI models in the AI Act*, p. 17: “For general-purpose AI models that have been placed on the market before 2 August 2025, providers must take the necessary steps to comply with their obligations by 2 August 2027. This does not require re-training or unlearning of models already trained before 2 August 2025, where implementation of the measures for copyright compliance is not possible for actions performed in the past, where some of the information for the training data is not available, or where its retrieval would cause the provider disproportionate burden. Such instances must be clearly justified and disclosed in the copyright policy and the summary of the content used for training.”

<sup>212</sup> See, for example, Amazon Prime’s announcement in March 2025 that it generate AI dubbing of certain audiovisual content available in its catalogue.

<sup>213</sup> AIA, op. cit., recital 27: “Diversity, non-discrimination and fairness means that AI systems are developed and used in a way that includes diverse actors and promotes equal access, gender equality and cultural diversity, while avoiding discriminatory impacts and unfair biases that are prohibited by Union or national law”.

<sup>214</sup> See for example the European Commission press communication welcoming a “new initiative to support European cultural and linguistic diversity in artificial intelligence,” accessible via the following link: <https://digital-strategy.ec.europa.eu/en/news/commission-welcomes-new-initiative-support-european-cultural-and-linguistic-diversity-artificial>

## **PART 3. MARKET IMPLEMENTATION**

**Encouraging the market.** Implementing a competitive market implies identifying competitive risks in order to avoid them (1.). It is then necessary to define operational facilitating measures. From this perspective, transaction fluidity will facilitate market emergence. In addition, a series of simplification tools will support this objective (2.). If tensions should persist in spite of these precautions, some suggest the support of an authority in negotiation (3.).

### **1. Current competitive risks**

Competition law naturally has a role to play in market establishment. Several questions can be posed from this perspective, particularly regarding the theory of essential facilities (1.1.), abuse of a dominant position (1.2.) and agreements (1.3.).

#### **1.1. Rejecting implementation of the theory of essential facilities**

**The theory of essential facilities.** AI providers could be tempted to invoke the theory of essential facilities in order to obtain access to cultural data.

This mechanism merits a brief discussion here. An essential facility is a set of elements (material or not) held by a dominant actor, which is not easily reproducible and which must be accessible to third parties so that they can develop their activity within a market. Though the theory developed historically with regard to material infrastructures, it was then extended by European judges to content protected by literary and artistic property rights. In the “Magill,<sup>215</sup>” “IMS Health<sup>216</sup>” and “Microsoft<sup>217</sup>” rulings, European courts considered that “the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve abusive conduct”<sup>218</sup>. The qualification of this conduct is, however, subject to cumulative conditions: the right must concern an indispensable element; must exclude competition in a derivative market; must not be justified by any objective consideration and prevent the appearance of a new product on the market, for which there existed potential demand from consumers. The Court of Justice subsequently confirmed that these conditions were cumulative<sup>219</sup>, and that the last condition concerning a new product should be understood as follows: “the refusal of an enterprise in a dominant position to give access to a product protected by intellectual property rights, when this product is indispensable for acting on a derivative market,

---

<sup>215</sup> ECJ, 6 Apr. 1995, case C-241/91, “Magill,” concerning television program guides.

<sup>216</sup> CJEU, 29 Apr. 2004, case C-418/01, “IMS Health,” concerning health databases.

<sup>217</sup> CFI, 17 Sept. 2007, case T-201/04, “Microsoft” and EU Comm., dec. 2007/53/EU, 24 March 2004, “Microsoft,” COMP/C-3/37.792: OJEU No. L 32, 2007, p. 23, concerning operating systems.

<sup>218</sup> “Magill” judgment, op. cit., pt. 50.

<sup>219</sup> “IMS Health” judgment, op. cit., pt. 38.

can only be considered abusive in the case where the business that requested the licence does not intend to limit itself, in substance, to reproducing products or services that are already offered on the derivative market by the intellectual property right holder, but intends to offer new products or services that the holder does not offer and for which there exists potential demand from consumers”<sup>220</sup>.

**Justification for excluding the theory of essential facilities.** In analysing the situation, it appears possible to exclude any implementation of the theory of essential facilities, first with regard to criteria, and then with regard to the situation.

With regard to criteria first, the “exceptional circumstances” in which the holder’s refusal would constitute abuse are not necessarily characterised in the present scenario. Indeed, the assessment criteria identified by the judge can be subject to nuanced analysis. In this way, cultural content can appear as an essential element, with AI providers recognising this themselves<sup>221</sup>. Furthermore, the criterion of excluding competition from the derivative market could be considered fulfilled—even if further study of the subject is required—since AI providers propose tools that automatically generate content on user demand, potentially allowing this to be characterised as a derivative market. It could be objected here, however, that refusal by certain holders is not refusal by all: AI providers are free to negotiate licences with those holders who are favourable to it, so that the market is not really inaccessible, but at most limited for the moment<sup>222</sup>. The fourth criterion also raises questions: the definition of a new product proposed in the “IMS Health” case presupposes that the AI provider “must intend to offer new products or services that the holder does not offer and for which there exists potential demand.” Yet, the “new” character is not obvious, insofar as content generation is based on the compilation of pre-existing content. Assuming that compilation can produce novelty, especially when it is associated with new methods (the user directly asking AI to produce a result via prompts they submit to it). In any case, the third criterion alone allows a conclusion in favour of excluding the theory, since the criteria are cumulative. Indeed, the refusal must not be justified by any objective consideration. But in this area, refusal is justified by the key challenge of preserving human creation (which cannot be replaced by artificial content generation). The refusal is therefore objectively founded.

With regard to the situation, then, several elements must be noted, reinforcing the necessity of setting aside the theory. First, European judges have only applied it to very specific works (television programme schedules, health databases, operating

---

<sup>220</sup> Ibid., pt. 49.

<sup>221</sup> See notably OpenAI’s response to the consultation launched by the White House with a view to a future AI action plan, accessible via the following link: <https://cdn.openai.com/global-affairs/ostp-rfi/ec680b75-d539-4653-b297-8bcf6e5f7686/openai-response-ostp-nsf-rfi-notice-request-for-information-on-the-development-of-an-artificial-intelligence-ai-action-plan.pdf>.

<sup>222</sup> Here again, the criterion of the passage of time could play a role. Like music streaming—towards which many rightholders were initially reluctant before changing their minds after observing the proper functioning of this mode of consumption—it is not out of the question that rightholders who today are reluctant may in the future be more open to discussion, should the conditions for confidence be met.



systems)<sup>223</sup>. When it comes to data absorption by AI, the concerned content is both informational and cultural, and does not resemble that in cases with which the European judge has dealt. It is thus by no means established that the theory could be extended to cultural goods, and the task force considers that the latter should, on the contrary, remain limited to only “marginal” works. The theory itself is, moreover, based on the idea that rightholders refuse to agree to licence contracts, and that the mechanism may constrain them to do so. But the current situation appears to be just the opposite: if certain holders refuse, numerous others are not against the use of their content by AI, provided that it is verified and remunerated. Thus, there would be a kind of paradox in seeing AI providers plead the theory of essential facilities to obtain forced licences, despite refusing to enter into negotiation towards licensing agreements.

All these elements lead the task force to consider that the theory of essential facilities cannot be invoked against rightholders.

## 1.2. Possible characterisation of abuse of a dominant position

**Abuse characterised by non-compliance with certain obligations.** Other competitive risks exist and must be identified, among which abuse of a dominant position, which is likely to be sanctioned. Reasoning by analogy proves valuable in this regard. The Competition Authority has had occasion to affirm that Google abused its dominant position by imposing inequitable transaction conditions on publishers and press agencies to avoid having to remunerate the reproduction and display of content protected under press publishers’ related rights<sup>224</sup>. The authority thus noted a violation of the law induced by the refusal of remuneration, even though the legislator’s objective was value sharing<sup>225</sup>. It noted in this regard that Google had refused to communicate information allowing a remuneration amount to be determined. These findings led to injunction measures against the company, constraining it to comply with the law transposing Directive 2019/790 regarding press publishers’ related rights. The authority moreover

---

<sup>223</sup> See, however, in domestic law and applying the theory to musical works: TGI Paris, ref., 5 Sept. 2011: “the refusal to supply the catalogue for failure to accept the conditions of Universal Music France [...] constitutes in itself an abuse of dominant position because the refusal concerns a product that is objectively necessary to exercise effective competition on the market, and that the refusal is likely to lead to the elimination of effective competition on the market.”

<sup>224</sup> ADLC, dec. No. 20-MC-01, 9 Apr. 2020, relating to requests for interim measures presented by the Magazine Press Publishers’ Union, the General Information Press Alliance et al. and Agence France-Presse, pt. 260, 307 and injunctions p. 71.

<sup>225</sup> Ibid., pt. 253 and 254: “253. Finally, Google’s failure to communicate the specific information provided for by article L. 218-4, paragraph 3 of the CPI, and indispensable to any commercial negotiation between publishers and press agencies and online public communication services appears, in the current state of the investigation, to contradict the letter and purpose of the Law on related rights. 254. This circumvention of the Law on related rights is made possible by the dominant position from which Google benefits particularly in the market for general search services, and the weight that this represents in traffic on press publishers’ sites. For the same reasons, Google through its behaviour alone appears capable of depriving the Law on related rights of a large part of its effectiveness. Such behaviour is therefore likely to constitute a practice contrary to articles L. 420-2 of the Commercial Code and 102 of the TFEU.”

made the link between this case and conceivable solutions on competition law ground regarding generative AI, which reaffirms the value of reasoning by analogy<sup>226</sup>.

**Abuse and violation of compliance obligations.** More broadly, European judges have been able to consider that violation of a compliance obligation can constitute an “important indication” in qualifying the abuse of a dominant position<sup>227</sup>. The Court of Justice affirms in this regard that, in examining such abuse, a national competition authority can be led to rule on the concerned enterprise’s compliance with GDPR or other rules that do not fall under competition law. In such a scenario, examination of respect for these rules is limited to the sole purposes of noting anti-competitive abuse and imposing measures allowing this abuse to cease.

If the decision concerns violation of a compliance obligation, the reflection can easily be transposed to other types of obligations<sup>228</sup>. Repeated violation of the obligation to comply with copyright and related rights of Article 53 1 (c) of the AI Act could therefore constitute abuse.

National authorities are moreover focusing on this field, like the French Competition Authority which recommends verifying that while the data market is built it ensures “balance between fair remuneration of rightholders and access by model developers to data necessary to innovate, taking into account the diversity of data use cases”<sup>229</sup>.

**Abuse characterised by setting high prices or obtaining exclusive licences.** Furthermore, abuse could be identified in imposing an excessively high market price in order to de facto exclude competitors. Such behaviour would if necessary be likely to be sanctioned on competition law ground<sup>230</sup>.

---

<sup>226</sup> ADLC, opinion 24-A-05 of 28 June 2024, relating to the competitive functioning of the generative artificial intelligence sector, op. cit., pt. 340 et seq.

<sup>227</sup> CJEU, 4 July 2023, case C-252/21, “Meta Platforms et al. v/ Bundeskartellamt,” pt. 47.

<sup>228</sup> Add. Cass. Com., 27 Sept. 2023, No. 21 21.995 ruling that for a company to fail in its legal compliance obligations may constitute an act of unfair competition. And CJEU (Grand Chamber), 4 Oct. 2024, C-21/23, “Lindenapotheke,” which rules that the GDPR does not prevent Member States from providing in their national law the possibility for competitors of the alleged author of a violation of this regulation to invoke this violation before civil courts as an unfair commercial practice.

<sup>229</sup> Opinion 24-A-05 of 28 June 2024, relating to the competitive functioning of the generative artificial intelligence sector, p. 95.

<sup>230</sup> The French Competition Authority has moreover identified this risk. Ibid., pt. 257: “The refusal of access to data could take more subtle forms. Powerful operators could thus seek to acquire or consolidate a dominant position in the generative AI sector by proposing the payment of significant remuneration to content creators, particularly to exclude less established competing actors or potential entrants. Thus, according to certain stakeholders, the high remuneration could be compensated by increased market power due to the marginalisation or exclusion of less established actors. High remuneration of content creators could therefore, potentially, constitute abuse of a dominant position.”

The same is true for requiring exclusive licences, while non-exclusive licences seem to be the most adapted contractual form with regard to the use envisaged by providers<sup>231</sup>. It is, moreover, perfectly natural for rightholders to sign only non-exclusive licences for secondary exploitations. The Competition Authority has not failed to identify this risk<sup>232</sup>, which would de facto afford market power to actors having power to impose these conditions. The task force is currently only aware of non-exclusive licences agreed between AI providers and rightholders.

### 1.3. The unlikely risk of a cartel

**Absence of coordinated action.** Finally, on the rightholders' side, the risk of a cartel could be identified if they decided to position themselves in a coordinated manner, imposing a negotiation that would include them all and would thus imply concerted price setting.

Nonetheless, analysis of the current situation testifies instead to an uncoordinated movement. The very DNA of cultural content exploitation tends towards sectoral, non-harmonised negotiations, discussed according to numerous criteria (economic size of co-contractors, purpose of content use, etc.). This theoretical affirmation is reinforced by practical observation, which reveals scattered and uncoordinated contracts, so much so that this disparity reaffirms the sentiment that rightholders need support from public authorities to offer an equitable framework for negotiation.

The task force therefore believes that the risk of a cartel developing is, for the moment, minimal.

## 2. Simplification tools

**Importance of simplification.** Simplifying lawful access to data is one of the keystones of market emergence. Indeed, for now, some AI providers defend their actions based on the lack of practical and economic feasibility of obtaining a licence for such large datasets<sup>233</sup>. Obviously, this is not about imposing negotiation with each author or holder taken individually. The cost of this would be

---

<sup>231</sup> See notably U.S. District Court for the District of Columbia, Case No. 1:20-cv-03010-APM, Nov. 2024, p. 7: "Exclusionary Agreements with Publishers Prohibited: Google must not enter into a contract or other agreement with any Publisher to license data from any Publisher, website, or content creator, which provides Google exclusivity or otherwise restricts the Publisher's ability to license or otherwise make available the data to any other GSE or AI Product developer. This includes, for example, any agreement with a 'most favored nation' or any similar provision that would require the Publisher to give Google the best terms it makes available to any other buyer or licensee."

<sup>232</sup> Competition Authority, Opinion 24-A-05 of 28 June 2024 relating to the competitive functioning of the generative artificial intelligence sector, pt. 259: "Such [exclusivity] clauses, implemented by powerful operators, would indeed be likely to prevent their competitors from accessing data under the same conditions. These agreements would thus be likely to lock in data suppliers, thereby limiting competitors' opportunities."

<sup>233</sup> <https://storage.courtlistener.com/recap/gov.uscourts.cand.415175/gov.uscourts.cand.415175.489.0.pdf>, p. 43.

prohibitive. It is, however, essential to offer a clear and lawful path for secure access to quality content, which would empower innovators to develop generative AI technologies while respecting copyright and related rights, and at the same time permitting rightholders to obtain remuneration for the use of their content.

**These operational simplification tools aim to correct the prevailing asymmetrical relationship by allowing holders to recover greater market power by rendering what they supply more attractive.**

In this framework, simplification could concern both obtaining authorisations (2.1.) and access to content itself (2.2.). The task force specifies that these measures do not constitute autonomous measures but must be apprehended as **implementation modalities of the preferred market solution which promotes negotiation.**

### 2.1. Simplification of obtaining authorisations

**Variety of interlocutors.** One of the fundamental subjects of cultural content remuneration concerns the necessity of simplifying the obtention of authorisation. It is complicated, in practice, for the AI provider to have to individually address multiple rightholders over content it uses, given their abundance. Several entities, however, have the capacity to provide these mass authorisations.

First, the rightholder themselves can give authorisation to use this content by contract, in a scenario in which they have a sufficiently significant catalogue for this to present value in the AI provider's eyes. This is the case for numerous businesses in the field of music, press, audiovisual media, etc.

Collective management organisations are also capable of providing these authorisations for rightholders they represent (and on the basis of voluntary collective management)<sup>234</sup>. An example in this direction is under development in Germany. VG Wort—equivalent to Sofia in France—announced on June 1, 2024 a licence that would allow businesses to use catalogues for AI training and application. The scope is undoubtedly reduced for the moment, since it concerns a licence reserved for internal use, which therefore cannot be employed for AIS intended for commercial purposes. However, this path of reflection reinforces by analogy the role that collective management organisations could be called to play. Management contracts passed with VG Wort from June 1, 2024 entail automatic transfer by members of their rights necessary for granting licences (with the rightholder responsible for refusing if necessary); for prior management contracts, the mechanism can be added a posteriori if the rightholder has received detailed information. The licensing agreements—formulated in a non-exclusive manner, so that holders do not lose their ability to negotiate individually in parallel—will be distributed by RightsDirect, which will have the task of overseeing the collective management organisation's AI rights.

---

<sup>234</sup> On this preference accorded to voluntary collective management, see *supra*, Part 2, pt. 2.1.

**Unifying the parties.** Beyond this, different organisations could conceivably band together to negotiate common licensing agreements. This would be based on a “win-win” rationale. On one side, AI providers would have lawful access to vast content catalogues, with **significant economies of scale** and greater accessibility; on the other, rightholders would increase their **negotiating power**.

Indeed, such grouping provides for higher valuations—which translates into a higher price for the data mass—and greater power on the market thanks to a more oligopolistic position, which would also allow better distribution, since the price would be higher. As in any standard monopsony negotiation model, efficient organisation of suppliers considerably increases the latter’s capacity to be fairly remunerated.

**Technical provider.** Finally, a technical data provider<sup>235</sup>, which would have obtained the necessary authorisations upstream and which would serve as interface or simplified service desk, could also take on this role. It would act on mandate and, entrusted by rightholders, could negotiate licensing agreements in the name and on behalf of the latter with AI providers.

**The value of a plurality of solutions.** These different solutions are not mutually exclusive. Contractual freedom will guide the movement here, and AI providers would, according to their needs, contact one or another interlocutor. This affirmation is reinforced by the fact that AI providers need masses of data (which will undoubtedly orient them more readily towards collective management organisations or technical data providers). But they can also seek agreement with an actor having market power. This will be the case when the latter’s content is rare, or when it presents a specific identifying character. This is the case for AI proposing generated content “in the style of,” like the recent example of AI imitating the style of Studio Ghibli, produced without authorisation.

## 2.2. Simplification of content access

**The will to facilitate access to quality data.** In April 2025, the Commission unveiled its action plan for Europe to become the “AI continent”<sup>236</sup>. The strategy for the “Data Union,” which must facilitate access to “quality data,” indicates the need to simplify AI rules “in an inclusive process,” while respecting copyright.

---

<sup>235</sup> On the technical data provider, see *infra*, pt. 3.2.

<sup>236</sup> Commission Communication, “AI Continent Action Plan,” COM(2025) 165 final, 9 April 2025.

Realizing this objective with a commercial intention implies providing high definition files, failing which such files would not prove usable by AI providers. The goal is to be able to provide “technically turnkey” datasets.

Furthermore, these sets must be completed with quality metadata<sup>237</sup>. The process must therefore be piloted by—or at least leave an important place for—rightholders, failing which metadata risks being partially erroneous, so that provided authorisations will not be lawful and remuneration cannot be passed on. Rightholders’ authorisation must therefore come upstream, and not once the base has already been constituted. There is an essential traceability challenge here.

This facilitated access can operate through a direct relationship between parties, or by calling on an intermediary.

**Direct data provision.** The relationship can on one hand be established directly. Nothing justifies that this first solution be set aside for the exclusive benefit of intermediaries. Holders must, if they have the capacity to do so—particularly from a technical point of view—be able to propose their organised content themselves. Certain holders maintain media in this regard, and could therefore provide them.

**Indirect data provision.** The relationship can, on the other hand, be established indirectly, via recourse to intermediaries, particularly for those holders who would not be able to propose such content themselves. The utility of a third party actor’s involvement, which would serve as a counter, would be double. On the rightholders’ side, the technical data provider could remedy technical difficulties encountered in constituting organised and quality datasets, and in making these latter available. On the AI providers’ side, this intermediary would help reduce costs<sup>238</sup> as well as the difficulty—in some cases, the impossibility—intrinsic to strictly individual negotiations<sup>239</sup>.

---

<sup>237</sup> On the question of metadata linked to still images, see the CSPLA report, T. Azzi, Metadata and still images, 2021, accessible via the following link: <https://www.culture.gouv.fr/fr/content/download/293446/file/CSPLA%20-%20Rapport%20m%C3%A9tadonn%C3%A9es%20li%C3%A9es%20aux%20images%20fixes%20-%20juillet%202021.pdf?inLanguage=fre-FR&version=3>

<sup>238</sup> This issue has also been identified by the U.S. Copyright Office. See USCO, *Identifying the Economic Implications of Artificial Intelligence for Copyright Policy Context and Direction for Economic Research*, Feb. 2025, p. 46: “Policies should be crafted to fix the existing market failures, facilitating transactions and an efficient market outcome. This may entail, for example, clearly defining rights, establishing institutions to ease transactional frictions, or appropriately compensating for externalities”. (Our emphasis.)

<sup>239</sup> On the cost of purely individual negotiation, see notably Directorate General of the Treasury, *The artificial intelligence value chain: economic issues and France’s position*, Dec. 2024, op. cit., p. 7: “From an economic point of view, the utility and value of an AI model rely on access to and mobilisation of numerous and quality data. In this context, negotiating individually with each data owner or rightholder can constitute a significant cost for AI producers, even though maintaining an incentive to create quality French-language content is beneficial both for rightholders and for AI producers.”

**Features of the technical data provider.** To this end, it would be possible to turn towards heritage institutions like INA or BNF in France, as already proposed by the AI Commission report submitted to the President of the Republic in March 2024<sup>240</sup>, which implies appraisal both of content likely to be made available and authorisation models, which should not imply legal deposit reform<sup>241</sup>. One solution would, for example, consist in drawing inspiration from what has already been put in place by publishers and the BNF, with an exception in favour of persons with disabilities. Another path would be to put in place a tripartite agreement between the ministry, heritage institutions, and rightholders, in order to provide a solid foundation for ensuing negotiations. This agreement would then serve as a framework and would be followed by application agreements.

These two actors present the advantage of being accustomed to transparent content exploitation, and having a long history of entering into agreements with collective management organisations. The scope of their powers, which could intervene on specific mandate from holders or their representatives, should also be appraised. Must these actors be limited to a technical platform role for making content available? Or can they take on the role of intermediary capable of negotiating and signing licences in the name and on behalf of holders (always with their authorisation upstream)? The first hypothesis seems for now the most reasonable.

Beyond this, private actors could also take on the role of organising lawful data provision to AI providers, which would encourage the emergence of a new cultural content provision ecosystem<sup>242</sup>. Questions intrinsic to market constitution—particularly regarding the possibility for new actors to surface without the largest actors being able to obstruct them—will necessarily arise, as they do for any new market. By way of example, actors like Cairn would be likely to intervene as intermediaries. Cairn defines itself as a platform specialised in disseminating Francophone academic publications, mainly in the humanities and social sciences (HSS), but also, more recently, in science, technology and medicine (STM). The cultural content that this intermediary can offer is therefore distinct and, thus, potentially well-suited to demands inherent to AI providers' fine-tuning.

More broadly, certain data brokers, already established on the market and who therefore have guaranteed expertise, could have an interest in expanding to integrate cultural content. Such initiatives already exist on an international scale—for example, the Data Providers Alliance<sup>243</sup>.

The idea is thus to allow the secure constitution of large or “tailor-made” corpora, involving a strong differentiation challenge.

---

<sup>240</sup> See aforementioned report of the Interministerial AI Commission, *AI: our ambition for France*, p. 103.

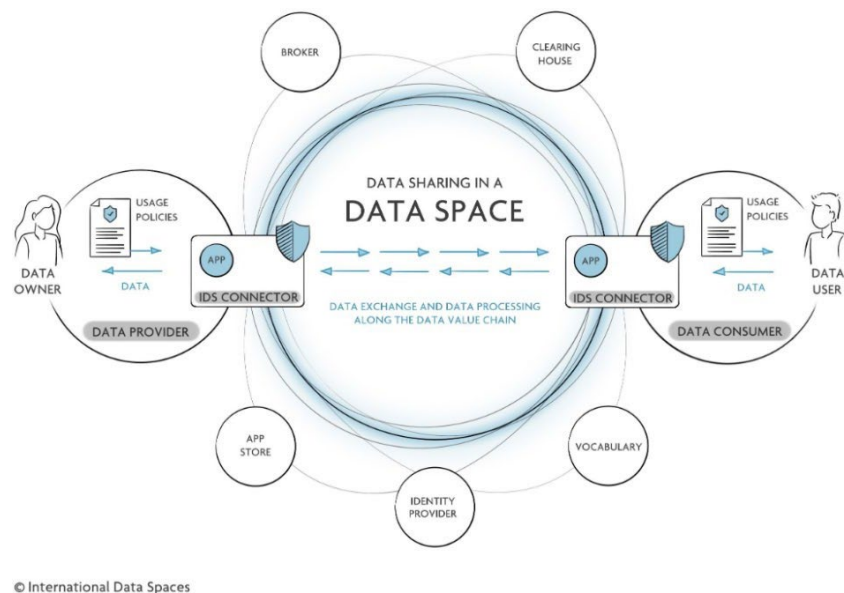
<sup>241</sup> A reform of legal deposit could moreover contravene European law – See art. 6 of dir. 2019/790, relating to the preservation of cultural heritage.

<sup>242</sup> On the subject, see notably the GF2I conference, *Data and Business Day*, accessible via the following link: <https://www.youtube.com/watch?v=BqUbwouTcks> (and notably at 1h21min on the subject of new ecosystems).

<sup>243</sup> <https://www.thedpa.ai/>

**The development of data spaces.** Lastly, the development of data spaces at the European scale could play a strategic role in the emergence of the market by facilitating access to a wide range of content, including specialised and quality content. In this regard, the TEMS project, supported by 43 organisations from the technology and media sectors, aims to design and implement a common data space for the media sector in Europe<sup>244</sup>. More broadly, these solutions highlight the value of data spaces, which could take on an interface function. The recent European data strategy mentions in this regard access to such common spaces through intermediaries called Data Labs<sup>245</sup>.

On this point, data quality will undoubtedly be essential. As already indicated, these must be reliable and documented (with appropriate metadata). Furthermore, interoperability<sup>246</sup> will be a guarantee of the effectiveness of actual data circulation. These spaces must also involve the relevant stakeholders in their governance to inspire the confidence necessary for their deployment. Finally, these technical regulations must receive public support.



*Graph by International Data Spaces<sup>247</sup>*

**The necessity of supporting data access.** Because data access is essential to AI development, numerous initiatives aimed at its facilitation are emerging.

<sup>244</sup> The project presentation is accessible via the following link: <https://cst.fr/tems/>.

<sup>245</sup> Commission Communication, “AI Continent Action Plan,” COM(2025) 165 final, 9 April 2025.

<sup>246</sup> On this subject, see the Task Force Report to CSPLA on interoperability, pres. F. Masmi-Dazi, Dec. 2024.

<sup>247</sup> The diagram is accessible via the following link: <https://www.imec.be/nl/articles/wat-zijn-data-spaces>.



This is notably the case with CurrentAI, an organisation whose creation was announced at the AI Summit last February. Both a foundation and an incubator, the entity does not aspire to be a technical data provider but can, if necessary, provide assistance in structuring the sector, by acting as a facilitator for experimentation and by fostering the meeting of supply and demand.

Furthermore, at the European level, the first consortium for a European digital infrastructure (Edic) was officially launched in March 2025, intended to facilitate access to multilingual data for AI training, called ALT-Edic, for Alliance for Language Technologies<sup>248</sup>. Coordinated by France, the entity has its statutory headquarters at the historic Château de Villers-Cotterêts. The concrete consequences of this for cultural industries remain to be understood.

**Value of the diversity of technical interlocutors.** The diversity of interlocutors likely to assume the role of technical data provider is a sign both of the practical feasibility of implementing this trusted third party, as well as of the ability to respond to the different demands of AI actors (large catalogues for model pre-training, specialised catalogues for fine-tuning, etc.). These different participants would not be mutually exclusive, but would rather all position themselves in the market, so that there is varied supply responding to the diverse demands of AI providers.

**Complementarity of interlocutors.** These two ways of making content available—direct or indirect—can be combined. As previously indicated, the value of data evolves according to AI phases. The role of the intermediary is also likely to vary throughout the stages: its place could be more important at the pre-training stage—the direct provision of massive and non-specialised datasets on behalf of rightholders—than at the fine-tuning stage, where it would rather become an aid to rightholders who would enter into contracts directly. Indeed, the more valuable the data, the more the rightholder may wish to enter into a contract without recourse to the intermediary of a technical data provider. The role of the latter could therefore be reduced as the specialisation of the model increases. It should be recalled that, when the need for data is massive, rightholders may find themselves technically unable to respond to the demand; only entities capable of providing multiple authorisations (collective management organisations, but also holders of large catalogues, etc.) will be able to offer a well-managed supply, with quality data and secure access. Similarly, while producers hold the masters of works and can therefore negotiate with AI providers, this is not the case for authors or performing artists taken individually. Conversely, in the specialisation phase, the need for targeted (or even direct) exchanges is greater. The provision of very specialised small datasets would thus be at the heart of the demand.

In other words, the collective approach is essential in pre-training phases, but the individualised approach remains pertinent—even central—for fine-tuning.

---

<sup>248</sup> Commission Implementing Decision (EU) 2024/458 of 1 February 2024 on setting up the European Digital Infrastructure Consortium for the Alliance for Language Technologies (ALT-EDIC).

Here again, everything is a question of nuance and measure in the gradation of the solutions envisaged.

### 3. Possible support from an authority in negotiations?

**Role of the authority.** A final avenue that could be considered for implementing the market would be that of a supporting authority to facilitate negotiation between AI providers and rightholders. The task force identifies, in this case, the prospect of reflection by analogy with what currently exists in terms of press publishers' related rights regarding the determination of fair remuneration due in exchange for the use of content<sup>249</sup>. For example, the Belgian legislator has established the jurisdiction of the Belgian Institute for Postal Services and Telecommunications (IBPT), an independent administrative authority, to intervene as a sort of mediator when parties cannot reach an agreement regarding the level of remuneration. Similarly, in Italy, AGCOM is entrusted with an equivalent function. This authority approved, by a decision of January 19, 2023<sup>250</sup>, a regulation defining reference criteria for determining the amount of fair compensation for the online use of press publications.

**Critical analysis.** The validity of these new mechanisms has been contested in front of national judges, who have transmitted two preliminary questions currently pending before the Court of Justice of the European Union. The Advocate General's conclusions are expected for June 12, 2025. In particular, a question arises over the binding nature of these authorities' decisions regarding fair remuneration, though the Italian authorities have confirmed to European judges that their actions were only consultative in scope, with the simple objective of facilitating dialogue and negotiation between the parties, and without the intention of a legally binding outcome. This is why the task force finds it more appropriate to speak here of potential support assumed by an authority within the framework of negotiations which, unlike in notions such as arbitration, would not impute a legally binding character to the opinion formulated by this authority.

This administrative framing of negotiations seems for the moment too uncertain to constitute a possible avenue for the task force. Furthermore, recourse to an authority is not supported by rightholders who denounce lower remunerations in this framework. Generally speaking, the fixing of remuneration for exclusive rights does not fall within the competence of the judge and/or another authority. Such a system may be conceivable in the case of a legal licence, but not when it comes to exercising an exclusive right, including in cases of mandatory collective management as in retransmission matters. Furthermore, such a system run by a French authority would, in all cases, be strictly limited to France. However, the licences negotiated with AI providers will be multi-territorial by nature, as is the case with all digital platforms with which rightholders contract.

---

<sup>249</sup> France has not yet equipped itself with a similar mechanism, but the subject is under consideration. See the bill aimed at strengthening the effectiveness of related rights of publishers and press agencies, No. 991, 18 Feb. 2025.

<sup>250</sup> AGCOM Dec. No. 3/23/CONS of 19 Jan. 2023, Regulation relating to the identification of reference criteria for determining equitable remuneration for online use of press publications as provided for in article 43-bis of law No. 633 of 22 Apr. 1941, accessible via the following link: [https://www.agcom.it/sites/default/files/migration/attachment/Allegato%2030-5-2023\\_0.pdf](https://www.agcom.it/sites/default/files/migration/attachment/Allegato%2030-5-2023_0.pdf).

## **PART 4. SUMMARY OF PROPOSALS**

**Duality of proposals.** At the end of this report, the task force, for its legal component, formulates certain recommendations for developing the legal framework (1.), which are backed by operational implementation tools (2.).

### **1. Recommendations for developing the legal framework**

**Soft law/hard law.** The recommendations to restore effectiveness to rights would be twofold. On one hand, soft law, a flexible instrument that gains the adherence of parties without constraint, could constitute a first step which would allow the anticipated establishment of a framework of trust (1.1.). On the other hand, in the absence of transparency and lacking progress on the return to the effectiveness of rights, legislated law should play its role, guiding the debate to impose the emergence of a market which would prove respectful of the value chain (1.2.).

#### **1.1. Soft law**

**Role of ethics.** Soft law must not be neglected insofar as it is likely to precede standards and, sometimes, surpass them. Dialogue, mediated by public authorities, can help instil calm and encourage a constructive meeting of minds. This could ideally give rise to a non-binding commitment, in the form of a charter, in which stakeholders would agree on the major principles of the negotiations that would follow: good faith negotiation, a transparency requirement, but also indicative elements for determining the object of contracts (content, types of use, compensation, etc.).

In this regard, the consultation launched on April 23, 2025 between generative AI model developers and cultural rightholders<sup>251</sup>, under the aegis of the Ministers of Culture and AI, is a welcome opportunity to initiate exchange.

The place of ethics in the digital environment is important, and the charter would act as a springboard towards further negotiation, allowing the licensing of cultural content use.

#### **1.2. Hard law**

**Presentation.** If the market is not formed and consultation does not lead to sufficient results, it will be up to the legislator—the sole guarantor of the general interest—to set

---

<sup>251</sup> On this consultation, see *supra*, Part 1, pt. 2.1.1.

a path. The recommendations that follow concern both the procedural (1.2.1.) and substantive fields (1.2.2.) of the exercise of rightholders' prerogatives.

### *1.2.1. Procedural law*

**Safeguarding the right to an effective remedy as a common thread.** The task force considers that rightholders' right to an effective remedy must be enshrined, primarily by the expected transparency of AI providers or, failing sufficient transparency, by related guarantees. The challenge is to safeguard the effective possibility of identifying the use of protected cultural content without being able to invoke trade secrets as a cover to preserve opacity.

The task force makes four rule proposals that could be considered in this regard, one in the pre-litigation phase, the others during litigation itself.

**In the pre-litigation phase**, or even in the absence of any litigation, an **AI mediator** could be established, comparable to what exists regarding the music, book or cinema mediator. Their mission would be to achieve conciliation between the parties, thus avoiding lengthy and costly litigation.

#### **Proposed text**

*"I. The AI mediator is tasked with a mission of conciliation for any dispute relating to the use of content protected by copyright or related rights by an artificial intelligence provider. This intervention is without prejudice to the right of the parties to bring the matter before a judge.*

*May submit a matter to the AI mediator any holder of copyright or related rights, collective management organisations and representative of said holders, as well as professional or trade organisations demonstrating an acting interest, or the Minister of Culture.*

*The AI mediator may, within and for the needs of the exercise of their mission, conduct hearings as well as request from the parties any information deemed necessary. Trade secrets cannot be pleaded to the mediator. Confidential elements, documents, and information transmitted in this context cannot be made public. The parties are bound by confidentiality.*

*The AI mediator may refer matters to the Competition Authority if the facts revealed appear to constitute anti-competitive practices. The mediator may also consult this authority for an opinion. Conversely, the Competition Authority may request the mediator's assistance on any matter within its competence and communicate any referral within the scope of the mediator's mission.*

*The mediator has a period of three months from the receipt of the parties' observations, or the expiry of the time allotted to produce them, to attempt to reconcile the parties.*

*In the case of an agreement between the parties, a record of conciliation is drawn up, specifying the measures to be implemented. It is signed by the parties and sets a deadline for its execution.*

*If no such agreement is reached within the allotted time, a statement of no settlement is established, either because there was a refusal to enter mediation or due to a lack of response to requests for information production. This record can be presented in court during litigation*

*proceedings. The mediator may also issue a recommendation on measures that could resolve the dispute.*

*The mediator may make public their decision of conciliation, non-conciliation, or recommendation, subject to information protected by trade secrets.*

*II. The AI mediator's mission is to promote dialogue between the parties. In this regard, they also make proposals to the Minister of Culture. They participate in and encourage the adoption of codes of practice between rightholders and AI providers.*

*The AI mediator sends an annual report on their activity to the Minister of Culture. This report is public. A copy is sent to the chairs of the permanent culture committees of the National Assembly and the Senate.*

*III. A decree by the Conseil d'État specifies the conditions of application of this article."*

**In litigation**, the mission proposes on one hand to reflect on the opportunity of a **presumption of use** (or presumption of exploitation and, consequently, of reproduction) within the framework of an infringement action, in order not only to restore the rights of rightholders but also to encourage AI providers to agree licences. This presumption could undoubtedly integrate internal positive law but also, more ambitiously, be considered by the European legislator, for example via a revision of the 2004 directive. Indeed, the AI technological landscape invites one to foresee a broad territorial effect of rules (as evidenced by the AIA), so that EU law is undoubtedly the best-suited to give full effectiveness to the mechanism.

### **Proposed text**

*"The object protected by copyright or related rights is presumed, unless proven otherwise, to have been used to achieve the generation of one or more contents by the AI system, when there are serious indications of this use.*

*May notably be considered as indications allowing to presume use:*

- 1°. The use of indexing robots on protected content as referred to in paragraph 1 of this article;*
- 2°. The observation of the presence of protected content of the same type in public databases used for model training or specialisation;*
- 3°. The existence of resemblances between the protected object and the generated content;*
- 4°. The mention of a credit, even erroneous, to a rightholder in the generated content;*
- 5°. Confessions made in a third-party procedure or public declarations recognising the use of protected content or datasets containing protected content;*
- 6°. The possibility of generating content 'in the style of' a protected object or a rightholder;*
- 7°. The refusal opposed by the defendant to the disclosure of evidence before the AI mediator".*

The task force proposes, on the other hand, to consider a provision allowing **class action within the framework of an infringement action brought against an AI provider**. This provision would usefully regulate cases brought by persons likely to plead the benefit of the presumption.

### **Proposed text**

*“I. When several natural or legal persons, placed in a similar situation, suffer harm having as common cause an infringement of the same nature to their copyright or related right by an artificial intelligence provider, a class action may be exercised before the competent civil court in view of the individual cases presented by the claimant.*

*II. This action may be exercised to put an end to the infringement mentioned in I, or to hold liable the person having caused the harm in order to obtain compensation for the harm suffered.*

*III. May exercise this action:*

*1° Collective management organisations;*

*2° Trade union or professional organisations representing rightholders;*

*3° Rights protection associations.”*

Finally, a **provision for injunctive disclosure of evidence** could be supported. This would be a balance rule, which would participate in the facilitating movement on probatory grounds, while preserving trade secrets where applicable.

### Proposed text

*“If the plaintiff—any holder of copyright or related rights, collective management organisation or representative of said holders, professional or trade union organisation demonstrating an interest to act—presents facts or evidence making plausible the use, by an AI provider, of their content protected by copyright or related rights, without authorisation, the judge is authorised to request, from said provider, or from any person likely to have provided them with such content, the disclosure of relevant evidence in support of the request.*

*This disclosure is limited to what is necessary and proportionate to support an action. If trade secrets are invoked by the defendant in a motivated manner, the judge takes measures to preserve the confidentiality of these elements.*

*The judge will draw inferences from the defendant’s lack of response.”*

#### 1.2.2. Substantive law

**Outline of remuneration.** The task force insists on the necessity of preserving the monopoly, inseparable from the remuneration that flows from exercising it. Thus, **individual management backed, where applicable, by voluntary collective management** appears as the most appropriate solution, rendering the contract the keystone for structuring relationships between market actors.

In this regard, the flexibility afforded by the contractual tool (regarding authorised types of use, remuneration amount, authorisation duration, etc.) is a decisive asset in an emerging market. The price would be negotiated based on multiple criteria (the objective of an AIS, phase, substitution, etc.) and could cover uses of protected cultural content at different phases.

Individual negotiation—which would result in non-exclusive licences—would leave open the possibility for rightholders to have multiple contracting parties, as well as the ability to adjust the price according to a given situation, taking into account, where applicable, the economic size of the AI provider.

## 2. Implementation tools

**Simplifying recommendations.** The task force also formulates simplifying recommendations aimed at supporting the nascent relationship between AI providers and rightholders.

Two fields are explored here: obtaining **authorisations** and **data access**. The stakes are numerous and the market remains under construction; the task force understands the practical impossibility of signing content-by-content contracts, which would be both extremely expensive and tedious. If authorisations must be able to be provided directly by the holder, the rapprochement of actors could prove useful, notably through the **grouping of cultural actors or organisations** or through the intervention of a **technical data provider** mandated by rightholders. The role of this provider would moreover be to expand data access, which should be provided in sufficient quantity and **quality** to permit exploitation. Here again, the rapprochement of actors could be an opportunity (even if direct provision always remains feasible). Finally, the creation of **quality and annotated datasets** could restore market power to holders and rebalance the prevailing asymmetrical relationship.

These measures must not be neglected. Simplification will allow those who take a virtuous approach to be supported along this path.



## Appendices

*Summary of responses to the questionnaire distributed in May 2024*

### **Preferences expressed by respondents to the May 2024 questionnaire**

**NB: many respondents propose several solutions without deciding between them; it is therefore not possible to attribute a unique choice to each respondent**

#### **In descending order of solutions receiving the most votes:**

- **63.4%** of respondents are in favour of **voluntary collective management**.
- **36.3%** of respondents are in favour of **individual management**. This option is, however, considered as an exclusive solution by only two respondents. The majority of those surveyed in this sense seem to demonstrate an attraction towards individual management as a way of preserving exclusivity in copyright, but without opposing other solutions (especially voluntary collective management).
- **25%** of respondents are in favour of **extended collective licensing**.
- **20.4%** of respondents are in favour of **mandatory collective management**.
- **9%** of respondents are in favour of **legal licensing**.
- **No respondent** is in favour of **compensated exception**, even if some occasionally consider it as a parallel to remuneration for private copying.

*List of legal task force interlocutors—individuals interviewed, contributors, or respondents to the questionnaire*

Alexandra Bensamoun and Julie Groffe-Charrier wish to thank all interlocutors for their part in these rich and constructive exchanges.

ADAGP  
ADAMI  
Aday  
Adda, Gilles (LISN-CNRS, LANGU:IA)  
ADLC – Autorité de la concurrence  
Adobe  
Aduallact  
Afnun  
AI disclosure project (Ilan Strauss, Tim O'Reilly)  
AI Collaborative (Martin Tisné)  
AIE (Associazione italiana editori)  
ALT-Edic  
APIG  
Association des traducteurs littéraires de France  
Association Les Voix  
Axel Springer  
Banijay France  
Bauer media  
Bergeaud, Antonin (HEC)  
BNF  
Bourreau, Marc (Telecom Paris)  
Brison, Fabienne (Cabinet Hoyng Rokh Monegier)  
Cafeyn  
Cairn  
CFC  
CNC  
Collectif En chair et en os  
Combe, Julien (Ecole Polytechnique)  
Condé Nast  
Controv3rse  
Ekhoscènes  
EMMA-ENPA  
Eurocinéma  
Eviden  
FEE/FEP (Fédération des éditeurs européens)  
France digitale  
France télévisions  
French flair entertainment

GEMA  
Geste  
GF2I  
Ginsburg, Jane (Columbia University)  
IFPI  
Imatag  
INA  
INRIA  
International Publishers Association (IPA)  
Lagardère news et info  
L'Express  
Les échos-Le Parisien  
Ligue des auteurs professionnels  
Linkup  
Ministère de l'économie, des finances et de l'industrie, Cabinet  
Ministère de l'économie, des finances et de l'industrie, Direction générale des entreprises  
Ministère de l'économie, des finances et de l'industrie, Service de l'économie numérique  
Ministère de la culture, Cabinet  
Ministère de la culture, Service des affaires juridiques et internationales  
Miso.ai (Lucky Gunasekara)  
Mistral  
NAC  
NRCO  
Netflix  
Panneau, Fabienne (Cabinet DLA Piper)  
Perchet, Vianney (ENSAE)  
PEReN  
Prisma Media  
Procirep  
Radio France  
Rolling Stone  
Roux Steinkühler, Marie-Avril (Cabinet MARS-IP)  
SACD  
Sacem  
SAIF  
SCAM  
SCFP  
SEPM  
SFA-CGT  
SGDL  
SIPA – Ouest France  
SNAC  
SNAM-CGT  
SNE  
SNEP  
SNJ  
Sofia

Sommet de l'IA, envoyés spéciaux (Anne Bouverot et Arno Amabile)

SPEDIDAM

SNE

SNEP

SPILL

TF1

Trustmycontent

Treppoz, Edouard (Université Paris 1)

UVA – United Voice Artists

*Mission letter*



**Conseil supérieur de la propriété littéraire et artistique**  
**[Superior Council of Literary and Artistic Property]**

Madame Alexandra BENSAMOUN  
Madame Joëlle Farchy  
Professors

Paris, April 12, 2024

**SUBJECT: Task force relating to the remuneration of cultural content used by artificial intelligence systems**

Dear Professors,

The machine learning technologies that are at the heart of artificial intelligence (AI) systems rely on large masses of cultural data.

Regarding data protected by literary and artistic property rights, French rightholders, faced with the increasing use of their works and performances, are increasingly deciding to exercise their right to object (“opt out”). While this constitutes a notable advance in terms of copyright protection in a rapidly evolving context, opt-out is insufficient and, if deployed at a large scale, could weaken the reliability of results produced by AI, along with the share of French content.

The principle of source transparency, enshrined in the draft European regulation establishing harmonised rules concerning artificial intelligence (AIA), offers a first legal foundation that will allow rightholders not only to verify that their objection to the use of their works and performances is taken into account but also, and above all, to derive the commensurate economic consequences in terms of remuneration.

From an economic standpoint, access to cultural data represents an essential challenge to ensure respect for economic models and value chains. Since the extraction of this data is likely to disrupt the balance of the sectors concerned, their value must imperatively be guaranteed with a view to the sustainability of the business models of all actors, while respecting public policy issues such as cultural diversity.

From a legal standpoint, the conditions now appear to be in place for the emergence of a balanced data market, ensuring both fair remuneration for rightholders and legal security

for AI model providers. The negotiation of a licence or the payment of remuneration to rightholders must therefore fit within both the European legal framework and the economic feasibility of the proposed solutions.

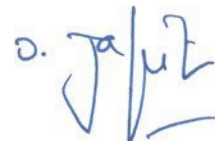
In this context, the Minister of Culture has asked the CSPLA to analyse, on one hand, the economic issues concerning access to data protected by literary and artistic property rights when such data is used by AI and, on the other hand, to examine the possible legal mechanisms for each sector aimed at guaranteeing rightholders the effectiveness of their rights when works are used by AI providers.

I propose that you conduct this mission as an extension of your previous work carried out within the CSPLA (the report on the legal and economic issues of artificial intelligence in cultural creation sectors, of January 2020, and the report on text and data mining exceptions, of December 2020), and as a complement to work conducted in parallel on the transparency obligation provided for by draft European regulations.

To carry out this mission, you will be assisted by a rapporteur. You shall ensure that you consult the services of the Ministry of Economy, Finance and Industrial and Digital Sovereignty, and you may rely on the services of the Ministry of Culture, in particular the general secretariat (legal and international affairs service). You will interview CSPLA members, as well as bodies and individuals whose contributions you deem useful.

It would be desirable that the progress of your work be presented during a plenary session of the CSPLA in 2024, and that your final report be presented during 2025, after having been subject to discussion with relevant CSPLA members.

I thank you for having accepted this mission and offer you my best regards.



Olivier JAPIOT  
President, CSPLA